

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

No. 77-1131

To be argued by: ALAN M. DERSHOWITZ.

PS

United States Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA,
APPELLEE,

v.

ROBERT P. MARCHAND, JR.,
APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT.

Brief for the Defendant-Appellant.

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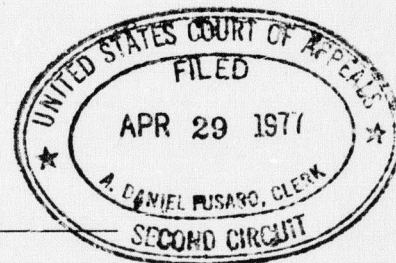




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I N T R O D U C T I O N

The central and overriding issue in this case is one of identification. There is no question that the defendant Robert Marchand resembles the marijuana supplier charged in the indictment. But there is every question that he is that person. From the outset, Marchand has maintained his innocence and insisted that he has been mistakenly identified as the supplier. And, on the record of this case, there is an enormous likelihood that Marchand was misidentified and wrongly convicted. At the pre-trial stages -- both investigative and grand jury -- the prosecution moved forward upon uncertain and unreliable evidence. At the trial, when confronted face to face with Marchand, the two eyewitnesses denied that he was the supplier. Moreover, substantial legal errors occurred at every stage which seriously increased the risk that the jury would convict upon unreliable and incompetent evidence and that the conviction of an innocent man would thereby wrongly result.

Q U E S T I O N S P R E S E N T E D

1. Whether the trial court erred in refusing to enter a judgment of acquittal when the government's case on identity consisted totally and exclusively of impeachment evidence and evidence of resemblance and acquaintance and there was no substantive evidence, either direct or circumstantial, positively identifying the defendant as the criminal actor?

2. Whether the trial court erred in a series of evidentiary and instructional rulings which allowed the introduction and use as substantive evidence of an unreliable photographic identification, a sketch whose accuracy was disclaimed, a witness' opinion that he had "misled the grand jury" and a note seized as the result of an unlawful arrest?

3. Whether the trial court erred in refusing to dismiss the indictment when the total evidence presented to the grand jury consisted of hearsay evidence in violation of the Estepa rule and identification testimony later ruled to be "infected with suggestion"?

S T A T E M E N T O F T H E C A S E

Robert Marchand appeals from his conviction of one count of possession and distribution of marijuana in violation of 21 U.S.C. §841, by a jury sitting on January 5, 6, 7 and 12, 1977, in the District of Vermont, Chief Judge Holden presiding (500).^{1/} On February 18, 1977, Marchand's Motion to Set Aside the Verdict and Enter Judgment of Acquittal was denied, and a judgment of conviction was entered. He was sentenced to one year imprisonment, with a special term of parole for two years and fined \$2,000, but execution of his sentence was stayed pending outcome of this appeal (522).

The charge against Marchand was that he supplied 180 pounds of marijuana to Richard Perkins and Victor Roy in Brattleboro, Vermont on July 18, 1975.^{2/} The central issue on this appeal is whether there was sufficient evidence to identify Marchand as the individual who allegedly engaged in that crime.

PRE-TRIAL PROCEEDINGS

Long before trial, it was revealed that Perkins and Roy were cooperating with the government and that the government would rely on their testimony to identify Marchand as the marijuana supplier whom both Perkins and Roy knew as "Big Foot" or "Bob." From the outset, Marchand

^{1/} The numbers in parantheses refer to pages in the appendix.

^{2/} The indictment originally charged Marchand with one count of conspiracy to distribute as well as one count of distribution, and it named as unindicted co-conspirators, Richard Perkins and Victor Roy. However, prior to Marchand's arraignment on September 17, 1976, the conspiracy count was dismissed and he went to trial on the substantive count only.

contested this identification, denying that he was the "Big Foot" or "Bob" who distributed the marijuana. Accordingly, he filed an extensive Motion to Suppress Identification Testimony (20) in which he challenged any and all pre-trial photographic identifications of him which had been made by either Perkins or Roy and all potential in-court identifications which either of them might provide (21). Marchand's challenge to any identification of him made by Perkins and Roy also formed a central part of his attack upon the indictment. See Motions to Dismiss II (25) and III (168).^{3/} Pre-trial evidentiary hearings were held on October 12, 1976 and January 5 and 6, 1977 and, as is set forth below, all but one of Marchand's motions were denied.^{4/} Because the evidence adduced at these hearings in connection with the identification issue sets the stage for understanding various evidentiary problems and objections which arose at the trial, the results of these hearings will be briefly reviewed before the evidence presented at trial is examined.

1. The Suppression of Roy's But Not Perkins' Pre-Trial Photographic Identification

As a result of the hearing on October 12, 1976, the trial court granted the motion to suppress Roy's pre-trial photographic identification. The judge based his decision upon the following findings of fact: On July 1, 1976 (almost a full year after the Brattleboro transaction) Roy

^{3/} Marchand also filed a Motion to Suppress evidence which had been seized from his person upon his arrest (23). One of the items seized -- a paper taken from Marchand's wallet containing Victor Roy's address and certain other notes -- was ultimately introduced against Marchand on the issue of identity.

^{4/} In addition to the trial court's negative rulings on the suppression and dismissal motions detailed below, the judge also refused to require the government to submit a sworn written response to the Defendant's Claim of Electronic Surveillance (15 , see 5) and quashed Marchand's subpoena for the pre-sentence reports of Roy and Perkins which Marchand sought under Jencks and Brady (8,103; see 216-218).

was shown an array of 14 photographs of approximately the same size by DEA Agent Handoga (147). Roy was "asked . . . to pick out the photograph . . . of anyone he recognized" and after he twice selected a photograph of someone other than Marchand,

" . . . Roy set aside . . . a photograph of the defendant, stating 'this picture looks funny.' With this, Agent Handoga produced a larger photograph of the defendant . . . and added 'OK, here's a Bob, what about this one?' Roy responded that the larger photo 'looks similar.'" (147)

The judge explicitly found, therefore,

" . . . that Roy made no positive identification of the defendant. His remark that the person pictured in [the larger photograph of Marchand] looked similar to the [smaller] photo, which was originally displayed to Roy, came only after the suggestion of the agent that the larger photo . . . was a picture of 'a Bob'" (148). ^{5/}

On these findings, the judge concluded that "Roy's identification, such as it was, is infected by suggestion" and therefore must be suppressed (159-160).

With respect to Perkins' photographic selections, the trial court made what is in some respects a similar set of findings. He found that on April 26, 1976 (approximately nine months after the alleged crime), Agent Handoga showed Perkins an array of 13 smaller photographs of approximately the same size and two larger photographs. One of the smaller and one of the larger photographs depicted Marchand; the other larger photo-

^{5/}

Additionally, the judge found

"After Roy selected [Marchand's photograph], Agent Handoga asked him to look for any other photographs of people he recognized. Roy selected the photograph of the only female in the group and told Agent Handoga that it looked like the girl who was with 'Bob' at one time. Roy made no further identifications despite what he termed Agent Handoga's eagerness that he do so" (148).

graph was of a black haired individual.^{6/} Marchand was the only individual who was depicted twice (see 157-158). Handoga "asked [Perkins] to pick out the photographs of two people he felt most closely resembled the people he saw at the time of the marihauna transaction" (148-149) and Perkins first "selected three or four. . ." (149). Perkins was "then asked to initial the two that bore the closest resemblance to people he saw on the date of the transaction" (149). He initialed the large picture of Marchand and one of another individual, but failed to choose the smaller Marchand photograph (85).

The judge found that Perkins "was not certain that the individual depicted [in the large Marchand photograph] was the supplier." (149, emphasis added). However, the judge concluded that "the photographic identification of the defendant by Richard Perkins was not the result of 'unnecessarily suggestive confrontation'" (159) and hence denied the motion to suppress Perkins' identification testimony (165).

2) The Denial of the Motions to Dismiss the Indictment

Initially Marchand focussed his challenge to the indictment primarily on the use of uncertain identification evidence, derived from suggestive photographic procedures.^{7/} At that time defense counsel assumed that Roy and Perkins had been the source of the grand jury's information. Although the trial court did find, as a result of the October 12th hearing, that Roy's

^{6/} Perkins had previously described and drawn a sketch of "Big Foot" which depicted a clean-shaven individual with large facial features and short, light-colored hair. According to Perkins, only the large, light-haired picture resembled his sketch in any way (96).

During the nine-month interim between the crime and the photographic presentation on April 26, 1976, Perkins was shown no other photographs, nor brought to any line-ups. (See 148-149.)

^{7/} Marchand had also challenged the use of the grand jury subpoena power to bring Roy to the United States Attorney's office where he was subjected to suggestive photographic selection procedures.

"identification such as it was [was] infected by suggestion" and also that both Roy's and Perkins' photographic selections were not certain, he rejected the motion to dismiss on all grounds (152-159).

Subsequently, just prior to the commencement of the trial, when Marchand finally received the grand jury minutes as part of his Jencks material, he realized that the only live identification testimony which had been presented to the grand jury was that of Victor Roy; testimony by Richard Perkins, which had been given to a prior grand jury, was merely read to the indicting body by Agent Handoga (179-191). Based on the contents of the grand jury minutes^{8/} Marchand renewed his motion to dismiss the indictment in open court (203).^{9/} The minutes revealed that the only evidence introduced through Roy which had connected Marchand to the crime was Roy's acknowledgement that he had selected Marchand's photograph that morning (a selection which the trial court had suppressed as uncertain and infected with suggestion)^{10/} and that the government had failed to inform the grand jury that Perkins could be made available as a live witness. After argument and despite an explicit concession by the government that Perkins could have been available to appear before the grand jury in person (212) the trial court again denied the motion to dismiss (235).

^{8/} The grand jury minutes were introduced into the record as Defendant's Trial Exhibits A & B (203) and appear in the appendix at 170 (Roy's testimony) and 177 (Handoga's testimony).

^{9/} Marchand had already filed his Motion to Dismiss III (168) raising substantially the same issues but he had been unable to document and support that motion without access to the grand jury minutes.

^{10/} In fact, the grand jury minutes revealed that Roy had informed the grand jury -- as he had that morning informed Agent Handoga (147) -- that he knew his supplier only as "Big Foot or Bob" and that he did not "know any last name" (172).

3) The Preview of Roy's and Perkins' Inability
to Make a Positive In-Court Identification

Over defense objection, the trial court reopened the evidentiary hearing on the identification issue on January 5, 1977 to give the government the opportunity to establish that Roy had an adequate independent basis -- apart from his inadmissible photographic selection -- to support an in-court identification of "Big Foot" (219). The defendant was present and witnesses were sequestered for the hearing. Although the issue was supposed to be Roy's, not Perkins', ability to make an in-court identification, Perkins was called to the witness stand by the government and the judge allowed inquiry into his identification-ability as well. After describing the two or three occasions on which he had had an opportunity to meet with and observe Big Foot for five to ten minutes (243-246), Perkins was asked whether or not he could identify Big Foot in the courtroom. Perkins testified that although he saw "a few people that resembled the person," he did not see Big Foot (247); and when his attention was drawn specifically to Marchand, Perkins stated that he could not identify him as Big Foot (249, 250, 253).

After receiving a grant of immunity, Roy took the stand (250, et seq.). He stated that he had met "Big Foot or Bob" a "number of times" over a period of several years and briefly described him (266-267). Roy then testified that he did not see Big Foot in the courtroom (270). When Marchand was asked to stand up, Roy stated that "he doesn't look like Big Foot." Id. The government immediately subjected Roy to vigorous cross-examination, and large segments of his grand jury testimony -- including references to his pre-grand jury selection of Marchand's photograph -- were read into the record in an effort to impeach his

credibility before the eyes of the trial court (e.g., 271-275, 280-281). Roy maintained, however, that his pre-grand jury selection of Marchand's photograph had not been a definite identification (238-285, 289) and that "Bob Marchand is not Big Foot" (285). At the conclusion of the hearing, the trial court ruled that "there is an adequate independent basis" for Roy to be asked to make an in-court identification of "Big Foot, Bob, without reference to the [photographic] identification that was conducted by Special Agent Handoga that was previously suppressed" (301).

* * *

The jury was brought in and the trial immediately commenced.

THE TRIAL

1) The Government's Opening

In its opening to the jury, the government explicitly informed the jury that "the defendant, Robert Marchand, will be identified as the "Bob" that Perkins and Roy called and he will be identified as the "Bob" who supplied them with 180 pounds of marijuana" (304). Defense counsel immediately moved for a mistrial on the basis that the voir dire testimony of both Roy and Perkins had put the government on notice that no in-court identification of Marchand as "Big Foot" would be made and that the contrary suggestion to the jury was therefore improper (305).^{11/} The motion was denied (id.) and the government's case commenced.

2) The Government's Evidence

Perkins and Roy both testified to essentially the same facts

^{11/} An additional ground for the motion was the prosecutor's improper comment about the marijuana laws.

concerning the transaction alleged in the indictment. One hundred eighty pounds of marijuana were delivered to Perkins and Roy on July 18, 1975 in Brattleboro, Vermont (310-313, 353). The delivery was arranged through a telephone call with a person known as Big Foot or Bob.^{12/} After the call, Perkins and Roy drove in Perkins' car to the Brattleboro Howard Johnson's and waited for a period of time until Big Foot, a large man with blond hair (318-319), and a second man arrived in a white Thunderbird (311, 354, 358). Perkins and Roy followed the Thunderbird for a mile or so to a rest area where the two cars pulled in and the marijuana was quickly transferred to the trunk of Perkins' car (312-313, 358-359). Perkins and Roy then drove off and were arrested later that day when they attempted to sell the marijuana to a Drug Enforcement Officer (317-318, 360-361).

The only real question presented to the jury was one of identification: was the defendant Robert P. Marchand the man known as "Big Foot" who participated in the marijuana delivery? The evidence presented to the jury on this issue consisted of the following:

a) Perkins' testimony relevant to the issue of identification of Big Foot.

The first aspect of Perkins' testimony pertaining to the identification issue was his out-of-court, unsworn description of Big Foot. Perkins testified that a week or two after his arrest,^{13/} he had described Big Foot

^{12/} As is noted below at pp. 18-19, there was some discrepancy between Perkins' and Roy's memories as to whether the telephone call was to or from Big Foot. Cf. 309-310 with 354.

^{13/} The date of that description was not fixed by Perkins but he testified that he began cooperating with the government about a week after his arrest (332, 339 , 341-342) and Agent Handoga testified that Perkins "gave a description of the person who supplied him with marijuana. . . within two weeks after the arrest" (397).

to Agent Handoga as "a six foot, one, 220 pound man with blond hair. . . big features, the guy is big, has a big nose, big hands, broad shoulders. . . between 25 and 30 [years old]" (318-319). He did not recall having included in his initial description "anything else specifically about [Big Foot's] features" (319).^{14/}

Next, the government introduced, over defense objection, a sketch which Perkins had drawn^{15/} about a month after he had provided the government with his original verbal, unsworn, description of Big Foot.^{16/}

Although Perkins testified that when he drew the sketch he had been "trying to draw a picture of the person who gave [him] the marijuana" (319, 321; see 340), he admitted on cross-examination that "when I was drawing it I didn't really feel that it was anything. . ." (333). He stated:

^{14/} Later during his direct testimony, Perkins supplemented this description of Big Foot from his in-court memory of the way Big Foot had looked on July 18, 1975. He remembered Big foot as looking "very large. Very healthy. Very short hair, like a football player would look after he had been working out. . . [and dressed in] shorts or casual pants and T shirt. . ." (323). He also remembered Big Foot as being tanned, recalled no beard and could not remember whether or not Big Foot had been wearing glasses (323-324, see 342). There is, however, absolutely no indication on the record that this in-court version of what Perkins remembered Big Foot to have looked like on July 18, 1975 had been given to Agent Handoga at the time of Perkins' original out-of-court description.

^{15/} At a bench conference (320-321) counsel stated two grounds for the defendant's objection to the introduction of the sketch. First, based upon Perkins' testimony at the evidentiary hearing on October 12, 1976 in which Perkins had admitted uncertainty about the accuracy of the sketch (97-98), counsel argued that there could be no "fact foundation of reliability" for its admission into evidence (320). (In his subsequent testimony before the jury, detailed in the text below, Perkins reiterated his uncertainty about the accuracy of the sketch.) Second, counsel argued that the sketch was not a "statement. . . of identification of a person made after perceiving him" and therefore was hearsay and not admissible under Rule 801(d)(1)(C) of the Federal Rules of Evidence. Id.

^{16/} Although the sketch was labeled "Big Foot" (see 398), there was no testimony as to when the label was placed on the drawing or who placed it there.

"In my mind, I, when I was sketching it I just sat there for the longest time and didn't really know what to draw and that was just a - I just remember he was a great big, blond-haired guy and he just had big features. And I just drew a big, blond-haired, you know, male features" (334).

Perkins further acknowledged that he "didn't have a terribly good memory of [Big Foot] at the time he made the sketch" (id.), that when he was drawing it he "just [sat] there with a blank and just like I just drew it" (345) and that when he finished it he was not satisfied that it was a fair and accurate picture of Big Foot (343).

After Perkins' direct testimony about the sketch, the government called upon Perkins to "look carefully in the courtroom" to ascertain whether he could identify Big Foot (321-322). Although his attention was specifically drawn to the defendant, Perkins was unable to make an in-court identification of Big Foot (321-322, 331, 344). In fact, he testified that three persons in the courtroom -- two bystanders and Marchand -- "resemble[d] Bob, Big Foot in some way" (322).^{17/} Moreover, Perkins testified that he thought "it's a good possibility" that if Big Foot were standing in front of him he would be able to identify him^{18/} (331).

The last item of identification evidence introduced through Perkins, again over defense objection, was the photograph of Marchand which Perkins

^{17/} The particular feature of the defendant which reminded Perkins of Big Foot was the color of Marchand's hair (323); Perkins specifically testified, however, that Big Foot was larger in physical stature than Marchand (335, see 323).

^{18/} Perkins testified to having had an opportunity to observe Big Foot on several occasions. In addition to observing Big Foot during the July 18th transaction, Perkins met Big Foot in May 1975 for "5, 10, 15 minutes" (328) and on two other occasions when he accompanied Roy to meetings with Big Foot (328-329).

had selected from a series shown to him by Agent Handoga on April 26, 1976^{19/} -- some eight or nine months after the transaction in question (324, 325 - 326).^{20/} Although Perkins testified that the purpose of his looking at the photographs had been "to find two people that [he] had seen on July [18] 1975" (324), he admitted under cross-examination that when viewing the array he had been "looking for those pictures that were closest to the two men [he] had recalled back in July of 1975" (338, emphasis added), and that "the most [he] did was select out two or three pictures that resembled the two men [he] saw in July of 1975" (338-339, emphasis added). When pressed further, he admitted that when he selected Marchand's photograph he was "just saying this man looked something like Big Foot" (338, emphasis added) and that the selection was not a "positive identification." Id.^{21/} On redirect examination, the prosecutor elicited testimony which reiterated the "resemblance basis upon

^{19/} As with the sketch, defense counsel objected on the grounds that the photographic selection was not positive and therefore did not conform to the hearsay exception of Federal Rules of Evidence 801(d)(1)(C) (321, 325).

^{20/} Perkins testified that he was never asked to look at any photographs during the nine-month period between the July 18th transaction and April 26, 1976 and that he was "never asked to look at various people in a line-up to see whether [he] could select out Big Foot" (338).

^{21/} The government introduced no evidence as to the date of this photograph or of the defendant's age when it was taken. See Handoga's testimony (383, et seq.). Consequently, there is no way to determine whether it was taken contemporaneously with the transaction in question -- or years earlier.

which Perkins had selected Marchand's photograph:

"Q. Now, when you were looking at the photographs and Agent HANDOGA asked you to select the pictures that most closely resembled Bob, or Big Foot, is that right?

A. Yes.

Q. And is that what you did when you selected Government's Exhibit #19?

A. Yes (343, emphasis added). ^{22/}

b) Roy's testimony relevant to the issue of identification of Big Foot.

Roy, like Perkins, failed to make an in-court identification of the defendant as Big Foot. ^{23/} On direct examination Roy was asked "to look around the courtroom here" and state whether he saw "Bob or Big Foot or anyone who resembles him" (367). Roy answered, "I don't see him here," adding "there's probably a number of people here that might look vaguely like him." Id. On cross-examination, Roy picked out four people in the courtroom, including the defendant, whom, he testified, all "looked like this Big Foot" (379). He testified unequivocally, however, that Mr. Marchand "is not him." Id.

After Roy failed to identify Marchand as Big Foot, the prosecutor

^{22/}

Based on the tentative nature of the photographic identification, and the hearsay character of the surrounding testimony, the defense requested, but was denied, a limiting instruction precluding the jury from using Perkins' selection of the defendant's photograph as substantive evidence of the defendant's guilt (325-326). This request was renewed in substance and again denied at the close of the trial. (442,443)

^{23/}

Like Perkins, Roy testified to several opportunities to observe Big Foot in addition to the July 18th transaction. He stated that he had known Big Foot "while. . . going to College," prior to June 1971 (356,361) and had met him in March or April 1975 in a "crowded" bar in the Mt. Snow area (362). Between that time and the July 18th transaction Roy obtained marijuana from Big Foot on two other occasions (365-366).

commenced to question him about his previous testimony before the grand jury on July 1, 1976 -- particularly concerning the issue of identification. The following colloquy occurred:

"Q. And were you telling the truth to the Grand Jury that day?

A. Well, as I said before, I was misleading the Grand Jury to believe, influences, --

Q. Isn't it a fact, Mr. Roy, that you led the Grand Jury to think that you could identify Robert MARCHAND as the person who supplied you with the marijuana?

A. I guess that is what it came down to.

Q. And is that true, Mr. Roy?

A. Is it true that I misled the Grand Jury to believe that -

Q. Is it true that that is what you did, yes.

A. I would say, yes." (368)

After acknowledging that the defendant was a friend (368), Roy was further questioned along the same lines:

"Q. And yet you led a Grand Jury to believe that this person -- this friend of yours, was the one who supplied you with marijuana, is that right?

Yes, that's what it came out to be." (369)^{24/}

^{24/} The prosecutor later pressed Roy on the friendship point:

"Q. When you talked to the Grand Jury and you indicated to them that Robert MARCHAND was the person who supplied you with the marijuana you got your friend in trouble, didn't you?

A. Well, I never thought that anything would come of this. I mean, I didn't think about Mr. MARCHAND until these pictures were put in front of me.

Q. Are you trying to get your friend out of trouble today, Mr. Roy?

A. I'm, I'm trying to tell you the truth." (372-373)
Emphasis added.

Under further questioning Roy continued to deny that the defendant was "the one who supplied [him] with marijuana" (369) and testified that he was "telling the truth now" (371, 373) for "the first time" (372, see 378).

Roy was also questioned about certain statements he had made to the grand jury concerning the first occasion when he met Big Foot after having been out of touch with him for a long time. Roy was asked who was Big Foot "with at that time" and Roy answered, "I don't know, with a girl. . . . I really don't know [her name] but it could have been Ann" (362). The following colloquy immediately ensued:

"Q. Do you recall testifying Mr. Roy before the Grand Jury in Vermont on July first, 1976?

A. Yes.

Q. And do you recall being asked these questions and giving these answers: "When you first met him on the first occasion down in Brattleboro, did he have a female person or associate with him?" Answer: "There was a girl with him, yes." Question: "Do you recall what her name was, or what part of the name you got?" Answer: "I think ANN." Do you remember giving those answers to those questions?

A. Yes.

Q. Was there a girl named ANN with him on that day when you saw him?

A. Now, truthfully, I really don't recall whether Big Foot was with a girl.

Q. But you did testify before the Grand Jury that he was with a girl, did you not?

A. That testimony shows that.

Q. And were you testifying truthfully before the Grand Jury?

A. Well, I must say that I was misleading the Grand Jury to believe certain things.

Q. Are you telling us that you were not telling the truth to the Grand Jury, Mr. Roy?

A. Well, I don't believe I told an out-right lie, but I probably had led the Grand Jury to believe certain things.

Q. So that you were not giving truthful testimony?

A. Not completely truthful." (363-364; see 375-376)

The prosecutor then switched the questioning to "Bob Marchand" and Roy testified that he had seen "Ann with Bob Marchand," that they "were friends" and were "probably" living in the same house (373). On cross-examination Roy acknowledged that a woman named Ann was the defendant's fiancée and that he had spoken to that Ann when he had telephoned the defendant's home (376). When asked on cross-examination, however, whether "the ANN that is mentioned in this Grand Jury testimony, have you ever seen that Ann or that girl, if there was a girl with Big Foot, have you ever seen that person with Robert MARCHAND?" (376), Roy answered

"A. Okay, you are asking me if the girl, - I don't even know the girl's name, the girl that was with Big Foot, you are asking me if I had ever seen that girl with Bob MARCHAND?

Q. Yah.

A. No, I haven't." Id.

c) Agent Handoga's testimony regarding Perkins' pre-trial efforts at identification.

Theodore Handoga, Special Agent for the Drug Enforcement Administration, confirmed that "within two weeks after [his] arrest," Perkins gave an out-of-court description of Big Foot (398); that "approximately one month after his arrest" Perkins drew a sketch "labeled as" Big Foot (id.); and that nine months later, on April 26, 1976, Perkins was shown a group of photographs for the "purpose" of "identify[ing] the individual who had supplied the 180 pounds of marijuana to [Perkins]" and whom

Perkins had already identified "as the person called Big Foot" (389-390). Handoga also testified, over defense objection, that Perkins "selected" or "chose" a photograph of Robert Marchand (391) after being "asked [by Handoga]. . . if he [Perkins] could identify the two individuals that had delivered the 180 pounds of marijuana to him in Brattleboro" (398).^{25/}

On cross-examination defense counsel pinpointed the contradiction between Handoga's and Perkins' testimony regarding what instructions Handoga had given Perkins prior to the photographic selection:

"Q. Sir, if Mr. Perkins testified that in April of 1976 you asked him to select two photos that looked most like the two people who [he, Perkins] saw in Brattleboro, July 18, 1975, would he be mistaken? (399). . . .

A. I feel he would be incorrect. I asked him to identify those two individuals, not the people that looked most like him" (400).

Handoga did admit that he had made no notes of the interview in which Perkins made his photographic selection (401), that the interview took "probably no more than 10 minutes" and that he was "testifying strictly from [his] recollection. . . ." (402).^{26/}

d) Telephone toll call records.

The government introduced two sets of telephone toll records as exhibits: one set (Ex. 8) pertained to telephone number 802-496-3175, listed to Richard Perkins, Waitsfield, Vermont; the other set (Ex. 9)

^{25/} This testimony, the defense argued, was hearsay (389), and should have been limited to impeachment (442), but the trial court admitted it substantively.

^{26/} Handoga also admitted that Perkins selected a second photograph (391-392) of a man named Daniel Cronin (392) but that no charges had been brought against Cronin (393), and further, that a line-up is a "more reliable way of determining identification than are the selection of photographs" but that the defendant was never asked to participate in a line-up (395, see 399).

pertained to telephone numbers 802-622-8206 and 622-8285 listed to Ann Curtis and Robert Marchand, 130-A New County Road, Guilford, Vermont (350-351). These exhibits show that in June and July 1975 several telephone calls were made from Perkins' telephone to one of Marchand's numbers (802-622-8206); that one such call was made on July 18, 1975; and that on that same date two calls to Marchand's number from a Brattleboro phone were billed to Perkins' telephone. (See 357-358.)

On cross-examination, Roy testified that on the day of the transaction he might have telephoned Robert Marchand -- admittedly his friend (see (372-373) and admittedly someone he telephoned on occasion (see 374, 376) -- "to ask if he [Marchand] would want to purchase some of the marijuana that [he, Roy] knew he was getting that day" (377). Further, although Roy testified that he "did call Big Foot" in connection with arranging the July 18th transaction (354), he could not recall Big Foot's number (355), and he did not testify as to how many times, when, to what number or numbers, or from what number or numbers such calls were placed.

Perkins, on the other hand, testified that the Brattleboro meeting was "set up" through a telephone call which he, Perkins, "received" from Big Foot at his house on the day of the transaction (309-310, emphasis added). He did not recall placing any calls while waiting that day in Brattleboro and testified that he had no present memory of the telephone number which, in July 1975, he had been "aware" could be used to reach Big Foot (329). The government then asked Perkins whether seeing Marchand's phone number refreshed his recollection and Perkins stated that it "could be it" (330, emphasis added), but he did not remember if he "ever called that number" himself. On cross-examination, Perkins admitted he could not state with certainty that "622-8206" was the number "used if someone had

had to reach Big Foot," and that in fact it was "just a number [he] guessed at as opposed to other numbers that were on this sheet" (337).

e) The note found on the defendant's person.

James H. Harris, Special Agent for the Drug Enforcement Administration testified that when he arrested the defendant he seized from his person a wallet containing a note which bore Victor Roy's address and several words -- "T Bird," "pictures of Ann and/or Bob," and "met me at UMass Bar" (382-383). Timothy Hillman, an Assistant District Attorney from Massachusetts, who had been the defendant's civil lawyer, testified for the defense in connection with this paper. He identified the paper as containing notes made by Marchand during a meeting in Hillman's office (422). During that meeting Hillman had related a conversation he, Hillman, had had with Victor Roy in which Roy had acknowledged making various statements to the government about Marchand. According to Hillman's testimony, the words on the piece of paper reflected the information which Hillman conveyed to the defendant about Roy's statements (419-422).

* * *

At the close of the government's case-in-chief and again at the close of the evidence, Marchand moved for a judgment of acquittal on the ground that there was insufficient evidence to sustain a jury finding on the identity issue (504, 404, 425). The motions were denied (417, 425). Just before closing arguments Marchand again renewed the motion for a judgment of acquittal asserting as an additional ground that Roy's admissions about having "misled" the grand jury could not be used as substantive evidence that Marchand was Big Foot (443). The motion was denied (444).

3) The Government's Closing

In its closing to the jury, the government tried to explain away the absence of any positive identification testimony. Although it had introduced no evidence that the defendant -- who is bearded and wears glasses -- had no beard and wore no glasses in July 1975,^{27/} the government argued that the defendant could have changed his appearance since the day of the transaction, thereby confounding Perkins who "is not a trained observer. . . [but] just a ordinary kid who was nervous and who got into a lot of trouble and who is trying to tell the truth now" (451).

With respect to Roy's testimony, the government focussed heavily on his grand jury appearance, repeatedly emphasizing the information he allegedly gave to that body. Thus, the prosecutor explicitly stated that Roy "gave sworn testimony under oath to a Grand Jury that identified Bob Marchand as 'Big Foot' or Bob, the supplier" (453); "he told the Grand Jury that this friend committed a felony; that this friend gave him 180 pounds of marijuana"(id.); and he "told. . . the Grand Jury that Bob Marchand was 'Big Foot'" (454).

After the closing, defense counsel immediately moved for a mistrial specifically on the ground that Roy's statements to the grand jury on the identification issue had not been introduced at trial and therefore the thrust of the government's closing was to ask the jury to speculate and

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The only witness who was asked about this -- defense witness Timothy Hillman (an Assistant District Attorney in Massachusetts) -- testified that he did not know if the defendant was bearded or was wearing glasses in July 1975 (423-424). (The comment by the prosecutor in her closing argument that "you heard Agent Harris say that. . . [when he] arrested Robert Marchand. . . Robert Marchand did not have a beard to the best of his memory. . . [and] was not wearing glasses, to the best of his memory" (452) has absolutely no support in the record. Agent Harris simply did not so testify. (See 381-383.))

create substantive evidence where there was none (458). The motion was denied. Id.

4) The Charge to the Jury

Because identification was the only real issue presented to the jury in this case, the defendant requested a series of instructions dealing exclusively with the testimony which had been adduced in connection with that issue. Thus, he requested that the jury be informed "that eyewitness identification is 'notably fallible' and that testimony tending to prove identity is to be scrutinized with extreme care. . . ." (440). He asked for a similar instruction with respect to Perkins' "tentative" photographic identification, particularly requesting that the jury be informed about the danger of "misidentification. . . even if the police follow the most correct photographic identification procedures" (441). He also requested that all of Perkins' testimony concerning his pre-trial efforts at identification, as well as Agent Handoga's testimony about those efforts, be used only "to impeach Mr. Perkins and. . . not be considered as evidence of the guilt or innocence of the defendant" (442). These requests were all denied (443, 444). With respect to Roy, defense counsel made a specific objection in advance in chambers to any instruction to the jury which would allow the use of Roy's admission that he had "misled the grand jury" as substantive evidence (443-44), but just such an instruction was given. (See 492). At the conclusion of the charge the defendant registered his objections to all of these denials (494-495).^{27a/}

* * *

Subsequent to the jury verdict of guilt, Marchand filed a written Motion to Set Aside the Verdict and Enter Judgment of Acquittal (505). After oral argument, the motion was denied on February 18, 1977 (506-521).

^{27a/} Portions of the charge are quoted in relevant context in the argument sections.

A R G U M E N T

- I. SINCE NO SUBSTANTIVE EVIDENCE, EITHER DIRECT OR CIRCUMSTANTIAL, ACTUALLY IDENTIFIES MARCHAND AS BIG FOOT, MARCHAND'S CONVICTION NECESSARILY AND IMPERMISSIBLY RESTS UPON CONJECTURE AND SPECULATION AND MUST BE REVERSED.

This is a classic case of misidentification: while both eye-witnesses testified that the defendant resembled their marijuana supplier, both stated categorically that he was not the one. The defendant presents an unequivocal claim of innocence on this appeal. Accordingly, the evidence on the identification question must be scrutinized with the utmost care to ensure that the jury-decision to convict was founded on truly sufficient evidence. See United States v. Miller, 381 F.2d 529, 541 (2nd Cir. 1967), cert. den., 392 U.S. 929 (1968).

There is a particularly great danger in this case that the wrong man has been convicted, for here the government explicitly exhorted the jury in its closing argument to ignore the absence of a positive identification and to focus its attention instead on evidence of resemblance and acquaintanceship and on its disbelief of Roy's testimony (450-457). As this Court has repeatedly emphasized, while "[t]he functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. . . . [t]he jury may not be permitted to conjecture merely, or to concluded upon pure speculation or from passion, prejudice or sympathy." United States v. Taylor, 464 F.2d 240, 243 (2nd Cir. 1972), emphasis added.

It is of course always necessary, when the sufficiency of the evidence is in question, for the appellate court to engage in a complete review of the evidence presented to the jury. In a case such as this, however, which involved a series of pre-trial evidentiary hearings in

which the trial court heard extensive evidence not presented to the jury, it is particularly important that the appellate review of the trial record be done meticulously so as to ensure that the ultimate decision as to the sufficiency of the evidence is predicated solely on the basis of the evidence which was actually presented to the jury -- and not at all on the basis of additional evidence which the trial court may have heard on voir dire but which was not presented to the jury.^{27b/}

The defendant respectfully submits that upon such a review this Court must find that the identity issue could not properly have been resolved against him beyond a reasonable doubt. As will be demonstrated below, the government's case on identity, when viewed in the light most favorable to it, consists exclusively of impeachment evidence and evidence of resemblance and acquaintanceship -- evidence which cannot singly or in combination support the conclusion that Marchand is Big Foot. Since there is simply no substantive evidence, either direct or circumstantial, which actually identifies Marchand as Big Foot, a verdict of guilty could only be predicated upon conjecture, speculation and surmise, and this case should never have been submitted to the jury. Accordingly, the defendant's conviction should be vacated and a judgment of acquittal entered.

The following sections will analyze each piece of evidence relevant to the identification issue to demonstrate first, that no single piece of evidence can support the verdict, and second, that when all the evidence is viewed as a whole, the totality still provides an insufficient basis upon

^{27b/} It is to be noted that this is not an exclusionary rule case where unequivocal evidence of guilt was presented to the judge but denied to the jury. The total evidence in this case -- that presented to the judge and that presented to the jury -- does not establish guilt beyond a reasonable doubt. It is Marchand's contention, however, that in evaluating the sufficiency of the evidence on appeal, only that evidence presented to the jury can be considered.

which the jury could have properly relied in finding beyond a reasonable doubt that Marchand was Big Foot.

A) No Positive Identification of Marchand as Big Foot
Can Be Derived From Perkins' Testimony.

Richard Perkins -- described in the government's closing as "just an ordinary kid who was nervous. . . and who is trying to tell the truth now" (451) -- was the witness upon whom the government relied most heavily to try to establish an identification of Marchand as Big Foot. The evidence introduced through Perkins, however, does no more than establish that Marchand resembled Big Foot.

1) In-Court "Resemblance" But Non-Identification Testimony

Perkins' efforts to identify Big Foot in the courtroom can only be fairly characterized as resulting in a complete failure and non-identification. When asked to try to identify Big Foot, Perkins selected three persons, including Marchand, who "resemble[d] Bob, Big Foot in some way" (323, emphasis added). The only feature of Marchand's which Perkins could articulate in support of this selection was the "sort of the color of his hair" (323); even Marchand's stature was different, Big Foot having been "larger" (335). When directly confronted with Marchand, and asked "Is that man standing, Big Foot?" Perkins testified, "as best as I can recollect, no" (331).

Such testimony falls far short of providing substantive evidence of identification. In Alexander v. United States, 354 F.2d 59 (5th Cir. 1965), several bank employees were unable to make a positive identification of the defendant as the alleged bank robber, and were only able to testify "that the man they saw in the bank resembled [the defendant]" (id., at 61). The Court reversed the conviction, stating

"While questions of identity are ordinarily for the jury and testimony as to identity need not be positive and certain. . . there must be something more than the testimony of a resemblance." Id., at 63.

See also Hendrix v. United States, 327 F.2d 971 (5th Cir. 1964); United States v. Luck, 447 F.2d 1333 (6th Cir. 1971). In United States v. Musquiz, 445 F.2d 963 (5th Cir. 1971) the court was faced with identification testimony at the opposite end of the resemblance spectrum. There the witness testified not to one feature of resemblance but rather to only one feature of non-resemblance. He stated the defendant "looks like the man. He is the man but he don't have a bump on his head" and agreed "that [the defendant] is identical in every respect except for the bump." Id., at 965, emphasis added. Yet the court classified this testimony as a "rather ambivalent identification" (id., at 966) and held that upon this identification "we are doubtful that there was sufficient evidence upon which to base a finding of guilty beyond a reasonable doubt." Id., at 966. Plainly, where the issue of identification is critical, a mere resemblance between the defendant and the criminal actor cannot provide a basis upon which the jury can rely in making a finding of identity.

* * *

To compensate for Perkins' inability to make a positive in-court identification, the government focussed the jury's attention on Perkins' pre-trial efforts at identifying Big Foot. However, as the following sections will demonstrate, Perkins at no time made any positive identification of Big Foot and none of his pre-trial efforts in that direction -- neither the photographic selection, the sketch, nor the description -- when viewed alone or in the context of all of the evidence, constitute direct or circumstantial evidence upon which the jury could have properly found that Marchand was Big Foot.

2) The "Most Resembles" Photographic Selection^{28/}

The trial record is clear that when Perkins selected Marchand's photograph from the array shown to him by Agent Handoga, nine months after the crime charged in the indictment, Perkins did not in his own mind positively identify the picture as being that of Big Foot. Indeed, Perkins testified that he understood his task to be to select the photographs which most resembled the men he had seen (337-339, 343) and that by his selection of Marchand's picture he was not saying that the man depicted was Big Foot, but only that he "most closely resembled Bob or Big Foot" (343). He further affirmatively testified that his selection of the defendant's photograph was not a "positive identification" of Big Foot^{29/} (349).

The need for "something more than the testimony of a resemblance" (Alexander v. United States, 354 F.2d, supra, at 63) is especially great when the primary identification is a photographic rather than a corporeal identification. The inadequacies of even the most certain photographic identifications are well-recognized:

"because of the inherent limitations of photography, which presents its subject in two dimensions, rather than the three dimensions of reality, . . . a photographic identification,

^{28/} As will be argued below in Section IIA, Marchand contends that the judge erred in allowing the photograph to be introduced into evidence in the first place. However, for purposes of the sufficiency of evidence argument it is assumed here arguendo that the photograph was properly before the jury.

^{29/} Perkins' testimony at trial on this issue is wholly consistent with his testimony at the pre-trial hearing on October 12, 1976 and, indeed, the judge found quite specifically on the basis of that hearing that Perkins had made a "most resembles" selection and not a certain identification (148-149).

even when properly obtained, is clearly inferior to a corporeal identification.' P. Wall, *Eye-Witness Identification in Criminal Cases* 70 (1965). Indeed, noting 'the hazards of initial identification by photograph,' we have expressly recognized that 'a corporeal identification . . . is normally more accurate' than a photographic identification. *Simmons v. United States*, 390 U.S. 377, 384, 386 n. 6, 88 S.Ct. 967, 971, 972, 19 L.Ed.2d 1247 (1968). Thus, in this sense at least, the dangers of misidentification are even greater at a photographic display than at a lineup." *United States v. Ash*, 413 U.S. 300, 332-333 (1973) (Brennan, J., dissenting).

The courts have thus recognized that where the issue of identity is critical, a tentative, uncertain photographic identification will simply not support a conviction. In *United States v. Keller*, 512 F.2d 182 (3rd Cir. 1975), the defendant was charged with passing two \$100 counterfeit bills. As in this case, the only issue in dispute was that of identity; and, the only witness who testified to the counterfeit transaction was unable to make a courtroom identification of the defendant. As in this case, the government tried to compensate for the lack of an in-court identification by introducing a photograph of the defendant which had been selected by the witness from a pre-trial photographic display. *Id.*, at 184. Also as in this case, however, the witness had not made a positive identification; all that he had said was that the photograph looked "most like" the person who had passed him the bills. *Id.*, at 184. The Court reversed the conviction, stating:

"We agree with appellant that this purported photographic identification was patently insufficient to sustain a conviction on this count. . . a conviction cannot stand where it rests solely on an identification as uncertain as this one." *Id.*, at 184.^{30/}

^{30/} There is some suggestion in *Keller* that its decision was influenced by a combination of a "deficient identification" and a suggestive photographic procedure. *Id.*, at 185. However, prior to making this comment,

United States v. Johnson, 427 F.2d 957 (5th Cir. 1970) presents a situation strikingly close to the one at bar. There the government presented two witnesses on the identification issue. One witness had previously made statements to a government agent identifying the defendant, but at trial he recanted those statements entirely. The court held that testimony by the agent reporting the witness' previous statements could not be used as substantive evidence against the defendant. The Court looked therefore to the second witness to determine whether there was sufficient evidence on the identification issue. That witness had been unable to make either a positive in-court identification or a positive pre-trial identification (id., at 958), and, indeed, her prior lineup identification had consisted of choosing "the individual who most closely resembled the man who robbed her." Id., at 960. In discussing the District Court's denial of defendant's motion for a directed verdict, the Court noted that allowing the jury to consider the witness' identifications

"overlooked, of course, the serious deficiency that [the witness] never at any time, when she saw the pictures, when she saw the defendant in the line-up, or when she saw the defendant in the courtroom, ever identified him as the man who robbed her. Several times she repeated that she would not be positive about that. She would go only so far as to say that in some respects the defendant 'was similar to the robber.'" Id., at 960 (emphasis added).

After reviewing the evidence as a whole, the Court noted "the result is that proof of guilt beyond a reasonable doubt is made to depend upon the

30/ continued from page 27

the Court had already ruled as noted in the text above that the "most like" identification was a sufficient basis to require reversal. Id., at 184. Moreover, as argued below at pp. 50-54, Marchand maintains that the procedures used in connection with Perkins' photographic selection were suggestive and the selection should have been suppressed on that ground alone.

[deficient identification] testimony of [the witness] plus the discovery of [certain objects] similar to those used and worn by the robber in the appellant's apartment two months after the robbery." Id., at 961. This was held "clearly insufficient to meet the required burden of proof," and accordingly, the judgment of conviction was reversed and dismissal of the indictment was ordered. The Court stated:

"Questions of identification are, of course, ordinarily for the determination of the jury. If however. . . the sole witness is unsure and there are no other connecting or corroborating facts or circumstances^{31/} the jury is left without evidence upon which to translate unrelieved uncertainty into belief from the evidence beyond a reasonable doubt." Id., at 961.

Defendant submits that this case falls squarely within the principles of Keller and Johnson,^{32/} and that neither Perkins' pre-trial "most-resembles" photographic identification, nor any of the other evidence in the case, provide a vehicle to "translate" the uncertainty of the identification into belief beyond a reasonable doubt.

Nor does Agent Handoga's testimony concerning Perkins' photographic selection add any substantive evidence on the identification issue. Viewed in the light most favorable to the government, Handoga's testimony casts doubt on that portion of Perkins' testimony in which Perkins asserted

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It is significant that the Court did not consider "the discovery of [certain objects] similar to those used and worn by the robber in the appellant's apartment" to qualify as "connecting or corroborating facts or circumstances."

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The similarity between this case and Johnson is particularly striking in view of the government's efforts to impeach Roy's in-court failure to identify Marchand as Big Foot. The only difference is that the government here attempted to impeach Roy by his own prior testimony not by the testimony of a third party. However, as will be seen below, the result required here is identical to that obtained in the Johnson case.

that he had been asked "to select two photos that looked most like the two people who [he] saw in Brattleboro, July 18, 1975" (see 399, emphasis added). Handoga testified that Perkins was "incorrect" in that assertion and that he, Handoga, had "asked [Perkins] to identify these two individuals, not the people that looked most like [them]" (400, emphasis added). However, even assuming that the jury believed that Perkins had indeed been asked to make a positive photographic identification, not a "most resembles" selection, that belief can provide no substantive evidence on the identification issue. The fact that Perkins received a preliminary instruction "to identify these two individuals" does not contradict Perkins' testimony that the selection he actually made was a "most like" selection, and not a positive identification.^{33/} Regardless of the words Handoga spoke or the instructions Perkins received, the question at issue is what was in Perkins' mind at the time he made the selection, not whether or not he was following the instructions he had been given.

Moreover, even if Handoga's testimony could be read as asserting that he, Handoga, had observed Perkins make a positive identification, that testimony could be used only to impeach Perkins' otherwise uncontroverted

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It should be noted that Handoga's testimony that he "asked [Perkins] to identify the two individuals" does not, strictly speaking, contradict Perkins' testimony as a whole since in addition to testifying that he was asked to select "most like" photographs, Perkins also testified that the purpose of the procedure was to have him identify the two individuals. (See 324). Moreover, it is interesting to note in this connection that based on the pre-trial testimony of both Handoga and Perkins, the trial court found quite explicitly that "Handoga. . . asked [Perkins] to pick out the photograph of two people he felt most closely resembled" the suppliers. (Emphasis added.)

testimony that he had made a tentative, not a positive, identification, and could not be used as affirmative evidence of a positive identification. Rule 801(d)(1) of the Federal Rules of Evidence states that:

"a statement is not hearsay [and is, therefore substantively admissible] if - (1) . . . the declarant testified at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. . . or (C) one of identification of a person made after perceiving him. . . ."

Handoga's testimony at issue here does not fall within the purview of either of these categories. It cannot be admitted substantively under (d)(1)(A) for it was not "given under oath. . . at a trial" and (d)(1)(C) plainly does not contemplate the substantive admission of such third-party testimony where what is being elicited from the third party is not simply evidence of the fact that an identification was made (see e.g., United States v. Barbat, 284 F.Supp. 409 (E.D.N.Y. 1968)), but is rather the third party's subjective interpretation of the nature and quality of the identifying witness' identification. Therefore, even if Handoga's testimony can be thought to serve as direct impeachment of Perkins' tentative photographic identification, that conclusion would leave Perkins' testimony in precisely the same position as the testimony of the first witness in United States v. Johnson, 427 F.2d, supra -- discredited by not replaced. In short, Handoga's testimony relating a denied identification is hearsay and cannot be deemed to constitute substantive evidence identifying Marchand as Big Foot.

3) The "Blank Mind" Sketch

Perkins testified that at the time that he drew the sketch he had no clear memory of Big Foot (334) and that, indeed, he "just sat there with a blank" (345) and drew a sketch which he felt was not a fair or accurate representation (343). In light of that testimony, the sketch -- like Perkins' inability to say any more in court than that the defendant "resembled" Big Foot -- simply cannot be deemed to constitute a positive identification of the defendant at all. If Perkins' testimony disclaiming the accuracy of the sketch is credited -- and there is no evidence to contradict that testimony -- then there is simply no foundation of reliability to the sketch and no factual predicate for its classification as substantive evidence of identification. Plainly, an "identification" disclaimed as of the time it was made is equivalent to no identification at all. If a witness viewing a lineup first points to "X" and then, after taking a second look says "no, it is not 'X,' it is 'Z,'" the initial, apparent effort at "identification" of "X" is not, in fact, an identification at all. The situation here with respect to the sketch is identical.

Moreover, even if the jury were to disbelieve Perkins' disclaimer of accuracy, the jury would be left with nothing more than a pictorial description of Big Foot -- another description, which like Perkins' verbal description discussed below, may in some respects resemble Robert Marchand, but which may also resemble countless others. A sketch, even

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As with Perkins' photographic selection, Marchand maintains that the judge erred in allowing the sketch to be introduced into evidence at the trial (see pp. 54-60 for argument), but for purposes of this argument treats the sketch as properly before the jury.

more than a photographic reproduction -- which, as noted above, pp. 26-27, is normally less accurate than a live, corporeal viewing (United States v. Ash, 413 U.S. at 332-333, dissent) -- suffers from inherent limitations of its method of production; and a sketch, unlike a photograph, does not even carry with it an assurance that the person depicted actually exists.

Clearly it cannot be said that the sketch at issue here so unmistakably resembles Robert Marchand, and no one else, that the bare outline drawing may support an identification of Robert Marchand beyond a reasonable doubt. Examining the sketch in the light most favorable to the government, it constitutes nothing more than a piece of evidence pertinent to the issue and cannot be deemed substantive evidence identifying Marchand as Big Foot.

4) The Non-Particularized Description

Perkins' prior description of his supplier is the most positive segment of his identification related testimony. He recalled that he had furnished Agent Handoga with the following description: "a six-foot, one, 220 pound man with blond hair. . . big features, the guy is big, has a big nose, big hands, broad shoulders. . . he was between 25 and 30" (318-319). This out-of-court description was not questioned and Perkins evinced no uncertainty. However, it cannot, by any stretch of logic, be considered an "identification." It fails entirely to provide the degree of certainty or specificity that could enable an individual, upon receiving that description, to match it with a particular individual. This Court has explicitly recognized the evidentiary worthlessness of a "general description" which could apply to "hundreds" of local residents. Brathwaite v. Manson, 527 F.2d 363, 371, see 367 n. 6 (1975), cert. granted, 425 U.S. 957 (1976).

Here, the "general description" of Big Foot as a big, blond, short-haired male simply narrows the search for the supplier to a class of men numbering at least in the high thousands. The probability that a person selected on the basis of that description would actually be the particular person sought is so infinitesimal that this description should not be classified as an "identification" at all. See People v. Collins, 68 Cal. 2d 319, 438 P.2d 33 (1968). Therefore, this evidence, although in a strict technical sense positive evidence relevant to the identification issue, provides no substantive evidence of an identification; nor may it be used in any meaningful sense as corroborative evidence of an identification -- for it would "corroborate" that thousands of men could have been Big Foot.

5) Even When Considered Collectively, The Perkins
"Identification" Evidence Does Not Identify
Marchand As Big Foot.

When all aspects of Perkins' testimony relevant to the issue of identification are considered collectively, the resulting collage supports, at most, a tentative identification. The only item which is truly positive -- the description -- is so general as to apply to untold thousands of persons and the remaining three items range from tentative (the photographic selection), to disclaimed (the sketch), to a flat denial (the attempted in-court "identification").

Although the jury may be free to disbelieve Perkins' inability to make an in-court identification and his disclaimer as to the accuracy of the sketch, such disbelief can do no more than negate that testimony; it cannot supply the affirmative factual evidence of positive identification which is necessary to support a finding of identification beyond a reasonable doubt. Indeed, the jury was specifically instructed as to its

limited choices if it believed that a witness had been impeached or discredited. The trial court instructed:

"A witness may be discredited or impeached by contradictory evidence or by evidence at some other time the witness said something or failed to say or do something which is inconsistent with his present testimony.

If you believe any witness has been impeached and thus discredited. . . you have a right to distrust such a witness's testimony in other particulars and you may reject all of the testimony of that witness, or you may accept some in part and reject others, but give it such credibility, in either aspect, as you think it deserves." (484, emphasis added.)

The limitation on the choices available to the jury was further amplified when the judge instructed:

"as in all matters that relate to inferences, or the examination of all of the evidence in the case. . . you must not base your verdict or inference on speculation, conjecture or guess [work in any form]. . . ." (497, emphasis added.)

Under these instructions, even if the jury disbelieved Perkins' disclaimer of positiveness, it would be entitled only to reject those aspects of his testimony which it disbelieved, and thereby eliminate that evidence from its consideration; it would not be entitled to speculate and create affirmative evidence opposite in content to that which it disbelieved.

As this Circuit stated in United States v. Cunningham, 446 F.2d 194, 197 (2nd Cir. 1971), cert. denied, 404 U.S. 950 (1971), quoting Kuhn v. United States, 24 F.2d 910, 913 (9th Cir. 1928), modified on other grounds on rehearing, 26 F.2d 463, cert. den. sub nom Lee v. United States, 278 U.S. 605,

"[t]he maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party was surprised." Emphasis added.

In the event of such cancellation or rejection of testimony "speculation cannot supply the place of proof." Moore v. Chesapeake & O.Ry.Co., 340 U.S. 573, 578 (1951).

Thus, while this Court has noted that disbelief of a witness' testimony may motivate a jury to "assume the truth of what he denies" (see Dyer v. MacDougall, 201 F.2d 265, 269 (2nd Cir. 1952)), it has recognized that a verdict of guilt cannot rest on such an assumption. The Court thus said in Dyer

"... although it is therefore true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him." Id. See United States v. Jenkins, 510 F.2d 495 (2nd Cir. 1975).

This is especially so in a criminal case in which the government has a heavy burden of proof and the defendant has none.

Accordingly, whether Perkins is believed -- so that the jury is left with a very general description, a disclaimed sketch, a "most resembles" photographic identification and an inability to make a courtroom identification -- or whether he is disbelieved -- so that the jury is left with assumptions and conjecture -- the Perkins evidence provides no basis to sustain the verdict of guilty. Nor, as the following sections demonstrate, does the record provide any other evidence sufficient either to bolster the deficient Perkins evidence or independently to support the verdict.

B) No Positive Identification of Marchand as
Big Foot Can Be Derived From Roy's Testimony.

Roy, like Perkins, was unable to make an in-court identification of the defendant as Big Foot. When asked "to look around the courtroom" and select "Bob or Big Foot. . . or anyone who resembles him," Roy stated unequivocally, "I don't see him here" (367). Like Perkins, Roy did testify that several people in the courtroom resembled Big Foot -- or "might look vaguely like him" (id., see also 379) -- but he definitively stated that "No [the defendant] is not him [Big Foot]" (379). In contrast to the situation with Perkins, the government had no evidence of out-of-court identification which it could introduce through Roy in an effort to counter or compensate for Roy's failure to make an in-court identification.^{35/} It had only impeachment evidence which, as the following sections will demonstrate, could not provide substantive evidence identifying Marchand as Big Foot.

1) Roy's Admission That He "Misled the Grand Jury"
Can Be Used As Impeachment Evidence Only.

In an apparent attempt to impeach Roy's courtroom inability to identify the defendant as Big Foot, the government questioned Roy concerning his grand jury testimony -- and in particular concerning whether or not he had made an identification of Big Foot before the grand jury. Roy was asked

"Isn't it a fact, Mr. Roy, that you led the Grand Jury to think that you could identify Robert MARCHAND as the person who supplied you with the marijuana?" (368),

and he answered "I guess that's what it came down to." Id. Roy repeated

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As a result of the evidence adduced at the October 12th hearing the Court had ruled that because of the impermissibly suggestive photographic identification procedures, Roy's photographic identification of the defendant had to be suppressed. (See 159.)

that same admission -- that he had "led" or "misled the grand jury to believe" that he could identify the defendant as Big Foot -- at several points in his examination. (See 368, 360, 372-373; testimony set out in Statement of the Case, supra, at p. 14.)

As the record plainly discloses, however, while Roy was questioned during this line of inquiry about his testimony before the grand jury, no statements that he had made before that body were introduced into evidence. Roy was neither asked to recall what he had actually stated to the grand jury regarding identification of Big Foot, nor was he confronted with the record of any statements which he had actually made to the grand jury concerning that issue. Nor further did Roy affirmatively state to this jury that he ever actually made a positive identification of the defendant as Big Foot before the grand jury.^{36/} Accordingly, at this point in the trial, the jury was not presented with the contents of any testimony or statements -- or any evidence whatsoever -- which had been previously presented to the grand jury. Whatever may have been the intentions of the government and whatever the government and the judge may have believed occurred at the trial, the record thus reveals that in all of the questioning of Roy on the issue of his veracity before the grand jury, the government failed to provide the jury with even one

^{36/} Ironically, examination of the grand jury minutes discloses that whatever impact Roy may have thought he had upon the grand jury, his testimony before that body neither contained nor constituted positive identification of Big Foot before that body. First, Roy informed the grand jury that he knew the marijuana supplier only as "'Big Foot' or Bob. . . [and] didn't know his last name" (172) and then he merely acknowledged that he had "picked out" from the photograph array shown to him by Agent Handoga an individual that he "recognized" (175, emphasis added). Marchand's name is nowhere mentioned. The implication of this testimony -- and the fact that it did not positively link Marchand to Big Foot -- is discussed in detail in Section III below.

direct statement identifying Marchand as Big Foot.^{37/} Indeed, the jury was merely informed by Roy of Roy's in-court agreement with the prosecutor that he had "misled the grand jury to believe" that he could identify the defendant as the supplier -- and that testimony was itself nothing more than Roy's opinion as to the probable effect upon the grand jury of whatever it was that Roy had stated to that body. As will be demonstrated below, Roy's opinion as to what occurred at the grand jury cannot be deemed to constitute substantive evidence of identification.

Rule 801(d) (1) of the Federal Rules of Evidence provides, inter alia, that a "statement" may be introduced as substantive evidence when the "statement" is "one of identification" (Subsection C) or when the "statement" is a prior inconsistent "statement" "given under oath" (Subsection A). Roy's admission fits within neither branch of this rule.

First, as noted above, the entire line of inquiry succeeded in eliciting nothing more than Roy's opinion that he "misled the grand jury." This opinion, for whatever it is worth, is simply not a "statement of identification" under Subsection C. While Roy's admission might allow an inference that a "statement of identification" of some sort

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Judging from the government's closing argument to the jury (see p. 20 supra) and the trial court's instructions in relation to Roy's testimony, both of which were the subject of objection by the defense, to be discussed below in Section IIB, it appears that the government and trial court did both mistakenly believe that actual statements made by Roy before the grand jury were presented to the jury. The confusion on this point in the mind of the trial court or the government doubtless arises from the fact that during the pre-trial voir dire the government did introduce into evidence an extensive set of statements which had been made by Roy before the grand jury concerning the identification of Big Foot. (See 271-275, 280-281). This set of statements does contain specific statements which appear to affirm Roy's prior photographic identification of the defendant as the supplier (but see n36 supra). Thus, the record of the pre-trial proceeding -- in contrast to the record of the trial -- does contain actual statements by Roy which may be reasonably interpreted as statements of identification.

had been made before the grand jury -- and while such a statement would have been admissible under 801(d)(1)(C) for the truth of what it asserts if offered -- there was in fact no such statement offered.^{38/} Plainly, in order for the jury to use a "statement of identification" for the truth of what it asserts, the jury must first know what the "statement" does assert and then must believe that to be true. See United States v. Rivera, 513 F.2d 519 (2nd Cir. 1975), cert. den. 423 U.S. 948 (1975).

Here, the jury did not learn what, if any "statement of identification" Roy made to the grand jury. The mere fact that the jury may believe that a statement was made cannot serve as a basis for the jury to infer the contents of that statement. Plainly, "statements of identification" vary in certainty and in accuracy, and the mere fact that some such statement was made provides no basis to infer where it falls on the spectrum. Thus, the fact that here the jury may have believed that Roy made some sort of identification of Marchand as Big Foot before the grand jury cannot be permitted to serve as a basis for the jury to conclude that Roy made a positive and correct identification before the grand jury -- particularly in light of his in-court disavowal of his grand jury testimony. Accordingly, Roy's testimony that he "misled the grand jury" -- insofar as that testimony relates to the question of identification -- is at best a statement which impeaches Roy's failure to make an in-court identification; it provides no "statement of identification" qualifying under Subsection C as a substitute for that in-court failure.

^{38/} As noted above, n. 36, the grand jury minutes reveal that no true statement of identification was ever made by Roy before the grand jury. However, even treating his statements to the grand jury as suggesting an identification of Marchand as Big Foot, those statements could not have been introduced at trial precisely because they had been suppressed by the judge as infected with impermissible suggestion (159).

Second, reliance upon Subsection A of Rule 801(d) (1) also fails to convert Roy's admission that he "misled the grand jury" into substantive evidence of identification. There were in fact no prior identification statements by Roy, inconsistent or otherwise, introduced at trial and consequently, there were in fact no statements which could have been admissible as substantive evidence under Subsection A of Rule 801(d) (1). While subsection A removes the common law barrier to using prior sworn statements for their truth, it does not expand the scope of the legitimate inferences which can be drawn from the evidence presented to the jury.^{39/} Thus, while Subsection A allows the jury to use as substantive evidence against a defendant a prior sworn statement which is actually presented to it, as noted above, the jury must first know the content of the statement and then believe that to be true before the jury can use the statement for the truth of the matter asserted. Plainly, Subsection A does not allow the jury to first conjecture what such a statement might be and then use the conjecture against the defendant. Yet, here, for the jury to have treated Roy's admission that he had "misled the grand jury" as Subsection A-evidence the jury would have had to have engaged in precisely such an exercise in conjecture. Again, without a statement before it which the jury could have used for the truth of the matter asserted, the jury was

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Prior to enactment of the Federal Rules of Evidence this common law barrier had been partially removed in this Circuit. United States v. DeSisto, 329 F.2d 929 (2nd Cir. 1964), cert. denied, 377 U.S. 979. The Rivera case, cited at p. 40 for the requirement that a jury must first believe the substance of the hearsay-exception testimony before it can use that testimony for its truth, was decided under DeSisto.

left with only one legitimate way to use Roy's admission that he "misled the grand jury" -- and that was as impeachment evidence.

This conclusion is further strengthened -- indeed, necessitated -- by the realization that to permit the jury to use Roy's admission as substantive evidence against Marchand would totally undercut the trial court's ruling on the defense Motion to Suppress Identification Testimony. After an extensive pre-trial hearing on October 12, 1976, the court found that Roy's photographic "identification, such as it was, is infected by suggestion" and therefore had to be suppressed at trial (159). The judge reiterated this same ruling after a second evidentiary hearing on January 6, 1977, just prior to the government's opening argument (301). Since whatever "misleading" of the grand jury Roy thought he may have done was based precisely upon that suppressed photographic "identification" (see 175), to allow the jury to use Roy's admission as substantive evidence would be tantamount to reversing the trial court's ruling and allowing the suppressed photographic identification to be introduced to help meet the government's burden of proof. Plainly, once suppressed, the photographic identification cannot be used for that purpose and must indeed, be used, if at all, only for the purpose of impeachment.^{40/}

^{40/} See Report of House Judiciary Committee, No. 94-355, 1975, U.S. Code Cong. & Admin. News (1975) 1092, 1093, in which Congress specifically expressed its intent to limit the operation of Rule 801(d)(1)(C) of the Federal Rules of Evidence (the "statement of identification" exception) to situations in which the statement of identification is not the product of impermissible and unnecessary suggestion; stating "Even if this precondition [the declarant's availability on the witness stand] is met, . . . [i]f the [out-of-court] identification procedure does not measure up to the constitutional standard [citing, *inter alia*, Kirby v. Illinois, 406 U.S. 682, 691 (1972) (quoting the due process standard for "suggestiveness"); *Simmons v. United States*, 390 U.S. 377 (1968) and *Stoval v. Denno*, 388 U.S. 293 (1967)], then the witness' out-of-court statement is not admissible."

Relegated to impeachment evidence, the line of inquiry about Roy's "misleading the grand jury" can add little to the government's case against Marchand. Whether Roy's testimony that he had "misled the grand jury" was believed (in which case it was believed that Roy had lied to the grand jury) or disbelieved (in which case it was believed that Roy was lying to the jury), it is clear that that testimony cannot create a basis to convict where none otherwise exists. As fully discussed above, pp. 34-36, an inference, supported only by virtue of its being the opposite of testimony properly used only for the purpose of impeachment, cannot be the basis for a verdict of guilt. Thus, even if the jury disbelieved Roy's in-court testimony entirely, and thus disbelieved his claimed inability to make an in-court identification, a finding beyond a reasonable doubt that Marchand was Big Foot cannot be permitted to be based upon that disbelief.

2) Roy's Testimony About "Ann" Proves
Nothing About Big Foot's Identity.

The only other testimony provided by Roy relevant to the issue of identification concerns the question of whether Big Foot and the defendant both knew the same person named "Ann." Roy had testified before the grand jury that when he first met Big Foot in the Brattleboro area "there was a girl with him" whose name was "I think Ann" (363). In contrast to Roy's grand jury testimony concerning the identification of Big Foot, his grand jury statements concerning "Ann" appear to meet the criteria of Federal Evidence Rule 801(d)(1)(A): the "Ann" grand jury statements were actually introduced, as statements, into evidence at the trial (see 363), and those statements create an inconsistency with Roy's in-court testimony that "truthfully [he] really [didn't] recall whether Big Foot was with a girl" at the time (id.).

But these statements, even if admissible as substantive evidence under Rule 801(d) (1) (A), ^{41/} fail to remedy the deficiencies in the government's case. At most, this evidence would have permitted the jury to find that Big Foot was associated with a woman named Ann. Admittedly, the jury also had before it uncontested evidence of the defendant's close personal involvement with a woman named Ann Curtis. ^{42/} However, this congruity of first names is wholly inadequate to support an inference of identification.

To begin with, the government introduced no substantive evidence, either before the grand jury or before the petit jury, to connect the "Ann" associated with Big Foot with Ann Curtis, the woman associated with the defendant. Roy, in fact, testified explicitly to the contrary, stating that the two Anns were not the same person (376). Even were this testimony disbelieved, however, "Ann" is such a common name ^{43/} that the jury could

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The defendant does not concede that the "Ann" grand jury statements were properly admissible under Rule 801(d) (1) (A). These statements to the grand jury were vague and equivocal, and for that reason may not have been admissible as substantive evidence at trial. See *United States v. Klein*, 488 F.2d 481, 484 (2nd Cir. 1973). Moreover, it appears from Roy's testimony that his mind may not have been focussed on the same fact when he testified before the grand jury -- the fact of "Ann's" identity -- which seemed to be the focus of a critical portion of the government questioning at trial (see 375). Under *United States v. Nuccio*, 373 F.2d 168, 172-3 (2nd Cir. 1967), cert. denied, 387 U.S. 906 (1967), the fact that "a witness' mind was [not] focussed on the identical fact at issue" may limit use of the prior testimony to impeachment only.

However, because in any event, as is discussed in the text, the "Ann" grand jury statements prove nothing about Big Foot's identity, this Court does not have to reach the issue of whether those statements are substantively admissible under 801(d) (1) (A).

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In addition to Roy's testimony acknowledging that the defendant and Ann Curtis were fiances (376), the telephone toll records showing the defendant Robert Marchand and Ann Curtis as living in the same house confirmed that the defendant was closely associated with an "Ann."

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Ann is reportedly one of the ten most common female first names and approximately one-third of all women in the United States are said to be named with one of the ten most common names. F. Loughhead, *Dictionary of Given Names* (1966), pp. 10-11.

not reasonably have inferred from the evidence presented to it that there could have been only one Ann involved with both Big Foot and Marchand. In short, while Roy's "prior statement" that Big Foot was with "I think Ann" may provide substantive evidence that Big Foot was associated with a woman named Ann, it provides no substantive evidence that Big Foot and Marchand were associated with the same Ann or that Big Foot was Marchand. To draw an inference of identity from such evidence requires precisely the kind of conjecture and speculation which must be eschewed in evaluating whether or not the evidence is sufficient to sustain the verdict.

In sum, Roy's testimony -- lacking as it does any direct identification of the defendant and consisting entirely of impeachment material -- provided the jury nothing of substance to use as a positive identification of Marchand as Big Foot.

3) The Other Evidence in the Case Failed to Provide Sufficient Connecting or Corroborating Evidence to Compensate for the Lack of Positive Identification Evidence.

When the question of identification is crucial and the identification is less than positive, more is required in the form of "connecting or corroborating facts or circumstances" to sustain a verdict of guilty. United States v. Johnson, 427 F.2d, supra, at 961. Here, the only evidence presented to the jury in addition to that introduced through Perkins and Roy, were certain telephone toll records and a note taken from Marchand's person at the time of his arrest. Defendant submits that this evidence falls far short of providing "connecting or corroborating" evidence sufficient to compensate for the absence of a positive identification, and that under the totality of the circumstances

there is a "very substantial likelihood. . . [that an] irreparable misidentification was made in this case." See Simmons v. United States, 390 U.S. 377 (1968); see also, United States v. Levi, 405 F.2d 380 (4th Cir. 1968).

The two sets of telephone toll records -- one of a telephone in the house shared by Roy and Perkins and one of a telephone in the defendant's house (350-351) -- showed that in June and July, 1975, several calls had been made to the defendant's house from the Roy-Perkins telephone, including a call on July 18, 1975. Two other calls to Marchand's house from Brattleboro, Vermont were also billed to the Roy-Perkins phone on that date.

The government argued to the jury that these telephone records provided circumstantial evidence of the defendant's involvement in the July 18th transaction (455-457). Victor Roy, however, provided an uncontradicted explanation of the July 18th calls to the defendant's house: Roy testified that he telephoned Marchand, admittedly his friend, to sell him some of the marijuana which Roy expected to obtain that day (377). Moreover, Perkins testified that the July 18th transaction had been arranged through a telephone call received from Big Foot, not made to him (309-310), and the records show no telephone call from Marchand's telephone ^{44/} to the Roy-Perkins telephone on July 18. Therefore, the only testimonial evidence introduced in regard to these documents gives no support

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While Perkins initially agreed that the phone number listed to the defendant's house "could be" the number used to reach Big Foot (330), he later admitted that, in fact, it was "just a number guessed at as opposed to other numbers that were on this sheet" (337).

to the inference invited by the government. Although the jury may disbelieve the Roy and Perkins testimony, and therefore may reject the inference that the calls made to the defendant were not made to Big Foot, the defendant's conviction, as has been discussed above, pp. 34-36, may not be allowed to rest upon the conjecture that the opposite of the disbelieved testimony is true. Thus, even if the jury chose to disbelieve the proffered explanation, it is left with nothing more than telephone records showing the existence of telephone communications between the Roy-Perkins telephone and the defendant's house. While such communications connect Marchand to Roy and Perkins, the do not connect Marchand ^{44a/} to Big Foot; they are evidence of acquaintanceship only.

So too the note found on Marchand's person does no more than confirm that Marchand was acquainted with Roy, and that before his arrest Marchand learned that Roy had made statements to the government implicating him. Like the telephone records, the note shows acquaintanceship and connects ^{45/} Marchand to Roy, but it says nothing about Big Foot's true identity. Like the telephone records, the note falls far short of providing evidence which could be legitimately relied upon by the jury to compensate for the government's deficient evidence on the identification issue.

The government, plainly aware of the great gap in its case, argued to the jury that the lack of a positive identification could be explained

^{44a/} While acquaintanceship and association may give rise to suspicion, these factors cannot even support a finding of probable cause (see e.g., Sibron v. New York, 392 U.S. 40 (1968), Henry v. United States, 361 U.S. 598 (1959)), much less to a finding of guilt beyond a reasonable doubt.

^{45/} The underlying fact that Roy made statements to the government before Marchand's arrest is obviously not evidence that Roy's statements were true; less still is the fact of Marchand's knowledge of Roy's actions probative of Marchand's guilt.

by the "fact" that Marchand could have changed his appearance since July 1975 by growing a beard and wearing glasses (451-452). But the government introduced absolutely no evidence that Marchand looked any different in July 1975 or that he had changed his appearance in any way.^{46/} The government cannot be allowed to obtain a verdict of guilt merely because a prosecutor cleverly spins out a plausible explanation in closing argument which, if accepted, might fill in a critical gap in the government's case -- even though there is not one word of evidence in the record to support it.

Indeed, when the totality of the evidence in this case is viewed as a whole, the picture which emerges is a classic pattern likely to lead to misidentification and the conviction of an innocent man. The eyewitnesses were pressed to cooperate with the government; they were acquainted with the defendant and had called him on the day of the crime; one witness selected the defendant's photograph as one which "most closely resembled" the supplier; the other witness made statements to the grand jury implicating the defendant but testified at trial that he had "misled the grand jury"; the defendant did resemble the supplier; when confronted with the ultimate question at trial, both eyewitnesses testified unequivocally that the defendant was not the supplier. On these facts -- and these are all that there are -- Marchand's conviction cannot be sustained.

^{46/} The prosecutor argued that Agent Harris had testified that Marchand did not have a beard and was not wearing glasses when arrested (452) but the record is crystal clear that neither Agent Harris nor any other witness did so testify. As discussed below at pp. 62-66 this misstatement of the evidence was a seriously prejudicial error in the context of the extremely weak case presented by the government.

II. BECAUSE THE JURY WAS ALLOWED TO HEAR
AND INVITED TO RESOLVE THE CRUCIAL
ISSUE OF IDENTIFICATION UPON INFORMATION
TAINED WITH CONSTITUTIONAL ERROR AND
LACKING ANY GUARANTEE OF RELIABILITY,
THE CONVICTION MUST BE REVERSED.

Even if this Court is not persuaded to reverse Marchand's conviction and enter a judgment of acquittal based on the insufficiency of the evidence on the issue of identification, the evidence presents such a close case -- and the likelihood that there was misidentification is so substantial -- that extreme care should be exercised in reviewing the trial record for other errors.

The defendant submits that at every stage -- in the government's opening and closing arguments, in the judge's evidentiary rulings and in his charge to the jury -- errors were made which allowed the jury to hear highly prejudicial inadmissible matters and invited them to resolve the identification question against the defendant on information which was tainted by constitutional error and lacking in guarantees of reliability. The key errors which will be discussed below were these: the admission of Perkins' uncertain and unreliable pre-trial efforts at identifying Big Foot as substantive evidence against Marchand; the failure to give cautionary and limiting instructions qualifying the use of Perkins' pre-trial efforts; the specific instruction to the jury to consider Roy's admission of "misleading" as substantive evidence against Marchand; the government's misstatement of the evidence on the identification issue in

its argument to the jury; and the failure to suppress the note found upon ^{46a/} Marchand's person at the time of his arrest. Because the sum effect of these errors was to permit a finding of identification to rest upon a flawed and unreliable evidentiary record, reversal and a new trial are mandated. As the Supreme Court observed in California v. Green, 399 U.S. 149, 163-164 n. 15 (1970), "considerations of due process might prevent convictions where a reliable evidentiary basis is totally lacking."

^{46a/} Furthermore, the trial court erred in refusing to require the government to submit a sworn written response to the Defendant's Claim of Electronic Surveillance (15, see 5). Marchand's claim, based on instances of phone malfunction and noise, was sufficient to require a response. United States v. Grusse, 515 F.2d 157 (2d Cir. 1975). Mere conclusory denials by the government have proven to be inadequate guarantees of statutory rights, see e.g., United States v. Smilow, 472 F.2d 1193 (2nd Cir. 1973), hence "those government agencies closest to the investigation must scrupulously search their files and submit affidavits affirming or denying the validity of the aggrieved party's claim and indicating which agencies have been checked." In Re Millow, 529 F.2d 770, 774 (2nd Cir. 1976). United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974); In Re Buscaglia, 518 F.2d 77 (2nd Cir. 1975).

- A) The Presentation Of A "Most Resembles" Photograph Selected Through Improperly Suggestive Procedures, And of a "Blank Mind" Sketch -- Each Too Unreliable To Qualify As A "Statement Of Identification" -- And The Invitation To The Jury To Use These As Substantive Evidence Of Identification Without Qualification, Constitutes Reversible Error.
-

Two critical items of evidence on the identification issue -- the photograph selected by Perkins pre-trial and the sketch drawn by him -- were both admitted as substantive evidence over vigorous defense objection (320-321, 325). The defendant submits that in light of the extensive evidentiary record establishing that neither the photograph nor the sketch were intended to be positive identifications of Big Foot -- and that in any event both lacked any factual foundation of reliability -- the introduction of these two items, especially without the requested limiting instructions, was reversible error.

There are two independent grounds upon which these items should have been excluded from evidence. First, as defendant argued in his pre-trial Motion to Suppress Identification Testimony (20), Perkins' selection of the photograph was the product of unnecessarily suggestive procedures; second, even if the photographic selection was not infected with suggestion, both that selection and the making of the sketch were so uncertain as "identifications" that neither one could be admitted as a "statement of identification" under Rule 801(d)(1)(C) of the Federal Rules of Evidence. Each of these two grounds will be discussed in turn.

- 1) The photograph should have been suppressed because of the impermissibly and unnecessarily suggestive procedures surrounding its selection or at the very least a cautionary instruction given.
-

The selection of Marchand's photograph occurred on April 26, 1976, nine months after the crime charged in the indictment. During that interim Perkins was shown no photographs, nor brought to any line-ups (148-149).

However, he had provided the government with a description of Big Foot and a sketch which depicted a clean-shaven individual with large facial features and short, light hair (see 148-149). Perkins was shown 15 photographs on April 26th: 13 small ones of approximately the same size and two markedly larger ones. Marchand was the only individual who was depicted more than once in the array; his picture appeared both as one of the 13 small photographs and also as one of the two larger photographs (see 157-158). The other large photograph was of a black-haired individual; and Perkins testified at the hearing that the large photograph of Marchand was the only photograph "that looked anything like [his] sketch" (95-96). Asked, according to the trial court's findings, to select the photograph ". . . he felt most closely resembled" Big Foot, Perkins chose the large photograph of Marchand (148, see 85). The judge found that Perkins "was not certain that the individual depicted [in the photograph] was his supplier" (149).

In light of these facts, a finding of improper suggestiveness was required. In Simmons v. United States, 390 U.S. 377, 383 (1968), the Court enumerated certain factors which would contribute to a finding of suggestiveness. Two of these are particularly relevant here: "the police display[ing] to the witness only the picture of a single individual who generally resembles the person he saw"^{47/}; and the showing of "the pictures of several

^{47/}

Exhibition of photographs of only one individual is "the most suggestive, and therefore the most objectionable method of pretrial identification." Kimbrough v. Cox, 444 F.2d 8, 10 (4th Cir. 1971). See also United States ex rel Gonzalez v. Zelker, 477 F.2d 797, 780 (2nd Cir. 1973), cert. den., 414 U.S. 924. Indeed, in such circumstances the government has conceded suggestiveness, Brathwaite v. Manson, 527 F.2d 363, 366 (2nd Cir. 1975), cert. granted, 425 U.S. 957; United States v. Barnes, 416 F.Supp. 1176, 1178 (W.D.N.Y. 1976).

persons among which the photograph of a single such individual recurs or is in some way emphasized.^{48/} Although in numerical terms the display shown to Perkins was not a one-photograph array, the neutral effect of multiple numbers was totally undercut by the fact that Marchand's picture was the only one which recurred, and that of the two large photographs his was the only one of a light-haired man. Consequently, as a practical matter, the arrangement of the photographs pointed to the defendant as "the one," and hence suffered from impermissible suggestiveness.

Nor was there any exigent circumstance compelling the government to act swiftly and intentionally ignore the suggestiveness of the array.^{49/} On the contrary, the procedure was conducted at the government's leisure, nine months after the crime, under circumstances totally devoid of urgency. Compare Simmons v. United States, 390 U.S., supra and Stovall v. Denno, 388 U.S. 293, 302 (1967). This Circuit has noted the capacity of the government to assemble proper photographic displays, especially when operating in a relaxed time frame. In United States v. Fernandez, 456 F.2d 638 (2nd Cir. 1972) the court was faced with an identification from a display of six photographs in which only one pictured an individual with the hairstyle and skin coloring of the defendant. The court held the

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In this situation "any identification of the photograph which stands out from the rest is no more reliable than an identification of a single photograph exhibited alone." United States v. Ash, 413 U.S. 333 (Brennan, J., dissenting), quoting P. Wall, Eye-Witness Identification in Criminal Cases, 70 (1965).

^{49/}

Since the government agent who conducted the proceeding had 11 years of experience and had conducted identification proceedings in the past (106), it cannot be argued that the suggestiveness inadvertently escaped the attention of the agent handling the matter.

display suggestive and admission of the identification testimony erroneous, stating:

"The Government's photographic collection must be extensive enough that, particularly with the lack of time pressure here, it could have produced another picture of an individual more nearly approximating [the defendant] in skin color and hairsyle." Id., at 641.

See also United State v. Barnes, 416 F.Supp. 1176, 1179 (W.D.N.Y. 1976) (display of one photograph when the government has "literally thousands" "approaches the inexcusable").

The delay in displaying photographs to Perkins is a further instance of unnecessary governmental inaction compounding the problem of obtaining a reliable identification and increasing the witnesses' susceptibility to suggestiveness. See Kimbrough v. Cox, 444 F.2d 8 (4th Cir. 1971); United States v. Cook, 464 F.2d 251, 253 (8th Cir. 1972), cert. den., 409 U.S. 1011. Scientific studies clearly demonstrate that memory retention and, therefore, accuracy of identification, declines significantly with the passage of time. See e.g., Buckhout, "Eyewitness Testimony," 231 Scientific American No. 6 at 23 (Dec. 1974). Perkins' diminished memory, caused by the unnecessary delay, could only have heightened the impermissible^{50/} effect of the suggestive procedures.

The defendant submits that under these principles the trial court erred in finding that Perkins' selection of the defendant's photograph "was not the result of 'unnecessarily suggestive confrontation'" (159),

^{50/}

The use of a photographic display, without attempting to obtain a corporeal line-up is also inexcusable. Courts and commentators alike have explicitly recognized the superiority of a line-up as an identification technique. Simmons v. United States, supra; P. Wall, Eyewitness Identification in Criminal Cases, supra; Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods, 38 Brooklyn L.Rev. 261 (1971). See Agent Handoga's testimony (103).

and that — particularly in light of the court's explicit finding that the selection was not a positive identification in any event (149) -- the defendant's motion to suppress should have been granted.^{51/} As will be fully discussed below at pp. 60-61, the trial court's error in refusing to suppress the photograph was seriously compounded by its failure to instruct the jury, as requested, to exercise caution in considering the probative value of the photographic selection and to bear in mind especially the fact that "because of the notable fallibility of eyewitness identification procedures, misidentification can occur even if the police follow the most correct photographic identification procedures" (see 440-441 and objections at 495-496).

- 2) Both the photograph and the sketch should have been excluded as substantive evidence because of the total unreliability of each one as a "statement of identification."

Even if suppression of Marchand's photograph was not required because of the suggestiveness of the procedures surrounding its selection, it should have been excluded as substantive evidence on the identification issue because it amounted at most to a "most resembles" selection and

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Even under the "totality of the circumstances approach" (expressly rejected in Brathwaite as inapplicable to identifications occurring, as here, after the Supreme Court's decision in Stovall), these identifications must be suppressed as giving rise to a "substantial likelihood of misidentifications." There are no mitigating factors to offset nor emergency factors to excuse the unreliability produced by the suggestiveness. Neither can the government justify the unnecessary delay, which not only dims the initial memory but emphasizes the suggestive identification procedure. See United States ex rel Bisordi v. LaVallee, 461 F.2d 1020, 1024 (2nd Cir. 1972). Finally, as will be discussed below, the identification itself was not positive. Even with the impermissibly suggestive procedure, it remained tentative at best. Therefore, under the totality of the circumstances approach, the selection of Marchand's photograph by Perkins fails to rise to the requisite level of certainty or reliability that would warrant its admission as probative evidence.

consequently could not qualify as a "statement of identification" for purposes of 801(d) (1) (C). So too the sketch drawn by Perkins with a "blank" mind lacked sufficient guarantees of reliability to come within 51a/ Subsection C.

The evidence on the unreliability of both the photographic selection and the sketch is clear upon the record. As noted above, the trial court explicitly found that Perkins' photographic selection was of a picture which "most closely resembled" and was not a "certain" identification of Big Foot (148-149). 52/ And Perkins' testimony at the trial fully reconfirmed the lack of certainty with which he had selected Marchand's photograph (see 338-339). Significantly, although there were two pictures of Marchand in the array (see 157), Perkins chose only one -- the large one -- as resembling one of the suppliers (149). 53/ Nor was Perkins' drawing of the sketch any more trustworthy. Drawn with no clear memory of Big Foot in mind and, according to Perkins, not amounting to a fair and accurate representation of Big Foot (see 334, 343, 345), the sketch simply cannot be considered a reliable rendition of Big Foot's appearance. The defendant submits

51a/ Since neither the photograph selection nor the sketch -- nor the testimony relevant to them -- was composed of statements made under oath, Rule 801(d) (1) (A) is, of course, inapplicable.

52/ This finding is fully supported by the record of the pre-trial evidentiary hearing (see 84-85, 88, 89, 90-91, 93).

53/ Agent Handoga's testimony that he asked Perkins to select photographs to "identify" his suppliers, "not the people that looked most like him" (400) can in no way overcome the unreliability of Perkins' selection. The judge apparently realized this, because after he heard substantially the same testimony from Handoga (104-105) and from Perkins (84-85, 90-91, 93) at the pre-trial hearing on October 12, 1976, he found as an explicit fact that "Handoga . . . asked [Perkins] to pick out the photograph of two people he felt most closely resembled the people. . . ." (148, emphasis added).

under these facts neither the photograph nor the sketch can be deemed an "identification" in any meaningful sense of that term and hence neither could properly qualify as an out-of-court "statement of identification" under Subsection C.

Subsection C, as discussed above at pp. 39-40, permits the jury to use for the truth of the matter asserted a report of a previous, unsworn out-of-court "statement of identification" -- at least as long as the identifying witness is available for cross-examination at trial. See Weinstein on Evidence 801(d)(1)(C) [01] at 801-107. In enacting that provision in 1975,^{54/} Congress codified what had been a growing trend among the courts: to recognize that evidence of "prior extra-judicial identifications" should be admitted "as independent evidence of identity" even though such "prior identification is hearsay." See Gilbert v. California, 388 U.S. 263, 272 n. 3 (1967); see also Weinstein, supra at 108-104-105. The rationale behind that trend has been the judgment that the underlying purpose of the hearsay rule -- to prevent the substantive use of unreliable evidence (see McCormick, Evidence (1954) 455-461; Advisory Committee Note to Federal Rules of Evidence, "Special Introductory Note: The Hearsay

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The Rules of Evidence were originally adopted without Subsection C but that provision was added by an Amendment which became effective in October 31, 1975.

The reason that Subsection C was not included in the original enactment was that the Judiciary Committee "decided to delete this provision because of the concern that a person could be convicted solely upon evidence admissible under this subdivision." Report of the Senate Judiciary Committee, No. 93-1277, U.S. Code Cong. & Admin. News 1974, at 1063. However, the Judiciary Committee later changed its mind based upon the recognition that "this exception is addressed to the 'admissibility' of evidence and not to the 'sufficiency' of evidence to prove guilt." Report of the Senate Judiciary Committee No. 94-199, p. 2-3 (1975).

Problem" at 252) -- is better served by allowing the introduction of identifications "made at an earlier time under less suggestive conditions" than those which may occur in the context of the courtroom. Advisory Committee Note to Rule 801. As expressed in language quoted by the Supreme Court in Gilbert v. California, 388 U.S., supra, at 272, n. 3. "evidence of an extra-judicial identification" should be admitted "because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. . . ." quoting People v. Gould, 54 Cal.2d 621, 626, 7 Cal.Reptr. 273, 275 (1960), emphasis added. It was precisely to capture that "greater probative value" that Congress enacted Subsection C, allowing substantive use of out-of-court "statements of identification." See Advisory Committee Note, supra; also see Weinstein, supra, at 801-102 n. 2.

On the record of this case, both the photographic selection and the sketch at issue here have relatively little, if any, probative value in identifying Marchand and thus they fall far outside the rationale of the rule. Indeed, both the photographic selection and the sketch are so lacking in certainty that as a practical matter it is difficult to see how they could come within the rule and qualify as "statements of identification" at all. To the extent that these two items do any "identifying," the photograph "identifies" a person who Perkins remembered nine months after the event as resembling Big Foot and the sketch "identifies" a face which Perkins created when trying unsuccessfully to remember, a few months after the event, what Big Foot did look like. As discussed above, at pp. 32-33, a sketch is particularly unreliable as a piece of "identifying" evidence because it may resemble countless individuals and, indeed, may

depict a "face" which does not even exist in real life.

Nor is it clear from the legislative history that Congress intended Subsection C to cover the introduction of pre-trial sketches and photographs at all. The legislative reports do not make any mention of sketches (see Report of the House Judiciary Committee, No. 94-355, U.S. Code Cong. & Admin. News 1975, at 1092; Report of the Senate Judiciary Committee, No. 94-199 (1975)), and with respect to photographs the history is at best ambiguous (see Weinstein, supra, at 801-807), and states nothing about the admissibility of a photograph itself. Indeed, on its face, the language of the rule -- allowing admission of a "statement. . . of identification of a person made after perceiving him" (emphasis added) -- would appear to restrict its operation to corporeal identifications only. While Weinstein rejects this strict interpretation insofar as such a reading would eliminate photographic identifications from the compass of the rule (see Weinstein, supra, at 801-107-108), the language of the rule does not readily admit of an interpretation which would include "the drawing of a sketch from one's memory."

These considerations weigh heavily against the substantive admission of the photograph and sketch in this case. Without a clear mandate from Congress that this type of identification evidence was even intended to be encompassed by Subsection C, the uncertainty and lack of specificity of these two particular items warrants their exclusion. Moreover, even if photographs and sketches as generic classes were deemed to fall within the rule, the Federal Rules of Evidence do not, under any circumstances, compel the admission of unreliable evidence.^{55/} Subsection C

^{55/} Rule 403 of the Federal Rules of Evidence provides, with respect to any evidence, that

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."

is not phrased as a mandatory rule but only as a definitional provision and Weinstein specifically notes that "[t]he trial court has the power to exclude evidence of an unreliable identification even if it comes within the confines of Rule 801(d)(1)(C)", supra at 801-110, citing United States v. Jenkins, 496 F.2d 57, 68-70 (2nd Cir. 1974), cert. denied 420 U.S. 925.

Jenkins is indeed apposite here. In that case, decided under the DeSisto rule, this Court approved the trial court's refusal to receive as substantive evidence a witness' prior photographic identification of one of the defendants precisely because of the lack of certainty surrounding that identification. The Court stated,

"... [T]here was little reason to credit Evans' prior out-of-court photographic identification of Wilcox, especially since Evans was unable to repeat it at trial and Agent Batt testified on voir dire that Evan was somewhat equivocal in making his identification. The level of certainty demonstrated by a witness is clearly one factor to consider in assessing the reliability of his confession. See Neil v. Biggers, 409 U.S. 188, 199 (1972)." 496 F.2d, at 69-70, emphasis added.

In explaining its decision, the Court in Jenkins stated

"It is true that we have been rather liberal in admitting a witness' prior photographic identification as affirmative evidence, at least where the witness could not presently make an identification [cases cited]. . . . But in each case where this has been permitted the requirements of the hearsay rule, while perhaps stretched a bit, were satisfied. In DeSisto, for instance, the prior identifications were either made under oath and subject to cross examination or were adopted by testimony subject to those safeguards on 'which our law places primary reliance for the ascertainment of truth.' . . . None of these conditions existed here." Id., at 68-69, quoting United States v. DeSisto, 329 F.2d, supra at 934.

Here too none of "those safeguards on 'which our law places primary reliance for the ascertainment of truth'" existed. The difference is that in Jenkins the trial court excluded the evidence and here the trial court refused to exclude it. The defendant submits that under the principle

of Jenkins and this Circuit's concern with safeguarding the truth-seeking process, ^{55a/} the trial court erred in so doing. ^{56/}

- 3) The trial court's instructions, inviting the jury to "consider" the photograph and sketch without qualification, virtually ensured Marchand's conviction on unreliable evidence.

The trial court's errors in refusing to exclude the photograph and the sketch were sharply exacerbated by the open-ended charge which the trial court gave to the jury in connection with this evidence. He charged, without qualification:

"Bearing on this crucial issue [of identification]. . . [y]ou may also consider the evidence in the case concerning the prior photographic identification by the witness PERKINS in his interviews with Special Agent HANDOGA, in April 1976, the description of "Big Foot" that PERKINS gave to the Drug Enforcement officers after his arrest on July 18, 1975. You may also consider the sketch that PERKINS prepared and turned over to Agent HANDOGA." (491-492, emphasis added.)

As noted above, p. 54, this charge was untempered by any instruction cautioning the jury to bear in mind the fallibility of eyewitness identification evidence, or the possibility of misidentification stemming from photographic selection procedures. Consequently, when the jury entered the deliberation room it had with it two concrete pieces of damning evidence -- a photograph of the defendant and a sketch which resembled the defendant -- and no instructions even suggesting that it

^{55a/} In United States v. Briggs, 457 F.2d 908, 910, n. 3, cert. den. 409 U.S. 986, this Court explicitly recognized the "dangerous" consequences to defendants' rights which can flow from a relaxed interpretation of Subsection A.

^{56/} In addition to registering his objection to the introduction of these two items of evidence under Rule 801(d) (1) (C) (321-322, 324-325) the defendant sought to achieve the same result by specifically requesting an instruction limiting their use to impeachment of Perkins' in-court failure to identify Marchand (325-326, 442). The defendant sought a similar instruction with respect to the portion of Agent Handoga's testimony in which the agent describes his recollection of Perkins' photographic selection (492).

should proceed with caution.

The need for such cautionary instructions could not be greater than in a trial situation such as this in which identification is the only factual issue in dispute and the government has no positive in-court identification to make its case. In such a situation, it is most certain that a jury would, during its deliberations, fall back on any concrete piece of evidence physically before it (such as a photograph and a sketch) and rely on that evidence heavily -- unless instructed by the judge to consider the concrete evidence cautiously. Here, the government practically ensured that the jury would rely heavily on the photograph and sketch by specifically exhorting the jury:

"Look at this sketch carefully. Look at the style of hair. Look at the features and look at the fact that there is no beard and no glasses. This is the way that Richard Perkins remembered his supplier. That is what he looked like when Richard Perkins saw him on July 18th, 1975 (450)^{56a/} . . .

Now look at this picture [photograph]. Look at the hair style. Do you see a beard? Do you see glasses? That is ROBERT MARCHAND and that is the picture that Richard Perkins chose as his supplier. Look at that sketch again. Look at the photograph again when you are in the jury room" (451).

Indeed, in light of this argument and the judge's unqualified charge to "consider" the photograph and the sketch, it must be assumed that the jury understood that it could resolve the identification issue exclusively by looking at the two concrete items it had before it -- without regard to Perkins' explicit testimony that the photograph was selected merely as one bearing a "resemblance" to Big Foot and that the sketch was drawn with

^{56a/} The government, of course, ignores here entirely Perkins' specific testimony that he drew the sketch without a clear memory of Big Foot (334) and that when he finished he felt it was not a fair and accurate picture of Big Foot (343).

no clear memory of Big Foot in mind. Thus, while in the ordinary case the failure to give the requested cautionary instructions might not rise to the level of reversible error, here that failure deprived the defendant of a critical safeguard to which he was entitled and whose absence virtually ensured his conviction on unreliable evidence.^{57/}

- B) The Invitation To The Jury By The Trial Court And The Government To Use Roy's Admission That He "Misled The Grand Jury" As Substantive Evidence Of Identification Constitutes Reversible Error.

As noted previously, p. 39, n. 37, it appears that both the trial court and the government were under the mistaken impression that actual statements were made by Roy to the grand jury identifying Marchand as Big Foot were presented to the petit jury. The record discloses that this was not so (see pp. 14-16, *supra*). However, the record also discloses that the petit jury was misled by both the trial court and the government into believing that it was so. Over defense objections (in advance, 443-444, and after 494-495) the trial court charged:

^{57/} The grave prejudice to the defendant was exacerbated by the government's explicit statement in its opening that "Robert Marchand will be identified as the 'Bob'... who supplied [Perkins and Roy] with 180 pounds of marijuana" (304). It must be assumed that the jury understood from the government's opening that the government had evidence that a positive identification would be made. With that in mind, the jury was necessarily even more likely to treat the Perkins' pre-trial endeavors as positive-identification evidence and to base its decision on that evidence. Since the government was on notice as a result of Roy's and Perkins' pre-trial testimony that no in-court or other positive identification could be made, it was improper for the government to indicate to the jury that it would receive such evidence. See e.g., *Virgin Islands v. Turner*, 409 F.2d 102, 103 (3rd Cir. 1969). This aspect of the opening was objected to unsuccessfully by the defendant (see Motion for Mistrial, 305).

"Now if you find that the witness ROY on that occasion before the Grand Jury, did identify the defendant MARCHAND along with his girl companion ANN CURTIS as the same person as 'Big Foot' whom he had previously seen with ANN Curtis, you may consider his testimony to the Grand Jury as substantive evidence of the facts as he represented them to be in his testimony to the Grand Jury and this is so, although the witness ROY has stated he misled the Grand Jury and was not entirely truthful to that body.

It is for you the Jury to determine in the light of all the evidence in the case bearing on the question which testimony of ROY is true. His testimony at the trial, or his testimony before the Grand Jury in July of 1976." (492)

The problem with this charge lies not in the middle portion in which the judge states "you may consider [Roy's] testimony to the Grand Jury as substantive evidence of the facts as he represented them to be in his testimony to the Grand Jury"; it lies in the initial portion in which the judge lists "the facts" which he, the judge, apparently believed Roy "represented them to be in his [Roy's] testimony to the Grand Jury."

A comparison of these "facts" with the record of Roy's actual trial testimony reveals that no such "facts" were, in fact, presented to the petit jury: first, the only grand jury statements by Roy which were introduced to the petit jury were statements which referred to "Ann" being with Big Foot, but which did not identify "Ann" as Ann Curtis nor identify Big Foot as Marchand (see pp. 15-16, supra); second, the jury never heard any statements by Roy, "grand jury" or otherwise, "identify[ing] ^{57a/} Marchand" as the same person as "Big Foot"; and third, Roy never used

57a/ While one of the prosecutor's questions asked

"When you talked to the Grand Jury and you indicated to them that ROBERT MARCHAND was the person who supplied you with the marijuana you got your friend in trouble, didn't you" (372),

Roy's answer was responsive only to that portion of the question seeking to elicit Roy's motivation. He stated

"Well, I never thought that anything would come of this. I mean, I didn't think about Mr. MARCHAND until these pictures were put in front of me" (372-373).

This answer did not contain a rendition of any statement he made to the grand jury but rather focussed on Roy's own thinking process in connection with his selection of Marchand's photograph -- a selection which was explicitly ruled not a positive identification and "infected by suggestion" and was suppressed by the trial court (147-148, 159-160).

the name "Ann Curtis," either in connection with Big Foot or in connection with Marchand. In short, Roy did not testify to the damning facts which the judge reported to the jury as Roy's testimony.

The prejudice to the defendant from this presentation to the jury is incalculable. The judge engaged in precisely the kind of speculative conjecture it was his duty to instruct the jury to avoid, and then he reported those speculations to the jury as "facts" which he invited the jury to find. This instruction is reversible error.

The grave damage to the defendant from this erroneous charge was worsened by the government's closing. The prosecutor explicitly stated that Roy "gave sworn testimony under oath to a Grand Jury that identified Bob Marchand as 'Big Foot' or Bob, the supplier"(453); "he told the Grand Jury that this friend committed a felony; that this friend gave him 180 pounds of marijuana" (id.); and he "told. . .the Grand Jury that Bob Marchand was 'Big Foot'" (454). This portion of the government's argument -- referring to Roy's testimony as if that testimony actually contained statements of identification when it contained none -- seriously misstated the evidence and misled the jury as to the inferences it was permitted to draw on a most critical aspect of the case.

Such prosecutorial "misstatement of facts in asserting [in summation] that there was actual evidence" of a fact when there was not is clearly "improper argument," and this Court has reversed convictions on, inter alia, this basis, without questioning whether the misstatement was negligent ^{57b/} or intentional--and even absent defense objection. United States v.

^{57b/} If intentional, such a mischaracterization would amount to unprofessional conduct. ABA Standards, The Prosecution Function §§5.8(a) and 5.9 (1971).

Persico, 305 F.2d 534, 357 (2nd Cir. 1962). Here, of course, there was specific defense objection in the form of a motion for mistrial (458) -- a proper vehicle to alert the trial court to the problem "so that the court can consider whether to attempt curative instructions or to declare a mistrial. . . ." United States v. Briggs, 457 F.2d 908, 912 (2nd Cir. 1972), cert. den., 409 U.S. 986. Once so alerted, it was plainly the duty of the trial court to "inform the jury" by "appropriate comment" that the prosecutor had gone "beyond what [was] in the case." See United States v. Pepe, 247 F.2d 838, 844 (2nd Cir. 1957); see also United States v. Miele, 481 F.2d 960, 963 (2nd Cir. 1973) (interruption of defense summation held not only proper but "demanded"); ABA Standards, The Function of the Trial Judge §5.10(ii) (1972). The prejudice resultant from the judge's failure to do so cannot be underestimated in this case. The Supreme Court has recognized that "the average jury, in a greater or less degree, has confidence that these obligations [of the prosecutor to state the evidence fairly]. . . will be faithfully observed." Berger v. United States, 295 U.S. 78, 88 (1935). Consequently, a prosecutor's misstatements are likely to carry much weight "when they should properly carry none," and, especially where the balance of the case against the defendant is as weak as it is here, "prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence." Berger v. United States, 295 U.S., supra at 88-89 (reversing conviction on the basis of prosecutor's closing and cross-examination). Under these principles, the judge's failure to correct the prosecutor's misstatements regarding Roy's testimony before the grand jury ^{57c/} -- compounded by

^{57c/} As noted above at p. 48, n. 46, the prosecutor also seriously misstated the evidence with respect to its claim that Marchand had "changed" his appearance since July 1975. This misstatement erroneously informed the jury that Agent Harris had testified that Marchand had no beard or glasses when arrested

the judge's own similar misstatement -- plainly requires reversal of this case.

C) The Note Seized From Marchand Should Have Been Suppressed As The Fruit Of An Unlawful Search.

The Marchand note, bearing Victor Roy's address and several words associated with the crime charged, had been seized from Marchand's wallet upon his arrest. Marchand moved pre-trial to suppress the note and other seized items, contending that his arrest had been illegal and consequently its fruits had to be suppressed (23). After an evidentiary hearing, held October 12, 1976, the trial court denied the motion to suppress (164) and as a result the government introduced the note against Marchand at trial. The refusal of the court to suppress the seized evidence constitutes reversible error.

* * *

Briefly summarized, the facts surrounding the arrest and subsequent search are these:

On August 24, 1976 at approximately 7:30 a.m., five federal and state agents entered the Lauderhill, Florida apartment of one Robert Higgins to execute a federal warrant for Higgins' arrest (149-150). Shortly after the arrest was completed, Marchand emerged from a second bedroom (150). At that time the agent in charge, Agent Harris, "had no idea" who Marchand was (115). Harris accompanied Higgins to his bedroom and remained with him while he dressed (150).

Harris testified that while he was with Higgins, Detective Adcock came into the bedroom with Marchand's driver's license and stated she had seen his picture before and believed he was wanted in the District of Vermont on a marijuana conspiracy indictment.^{58/} The trial court concluded

57c/ (cont. from page 65)

(452). Although not separately objected to, this misstatement contributed to the false and highly prejudicial picture presented to the jury by the government and thus contributes to the need for reversal.

58/ Detective Adcock did not testify.

that Marchand's identity was established by "removing his [driver's] license from his wallet" without his cooperation (163, see 151).

Marchand testified that when he originally entered the dining room from the bedroom he had asked if he was under arrest, was informed that he was not, and returned to the bedroom, followed by an officer who waited while he finished dressing (126). His unrebutted testimony was that at that time his wallet was on the dining room table, closed, and his license was in his wallet (127-130). Marchand was not asked for identification (135-136), and he never gave any of the officers his name (130). To the best of his recollection, the wallet had been flipped open by the time he returned to the dining room after dressing (129-130). At that time, Marchand was told that even though he was not under arrest he would not be permitted to leave (126-127). Adcock's information was then verified by telephone and Marchand was formally arrested (151). Officer Harris testified that following the arrest he seized the wallet from Marchand's person (112), searched it "looking for other evidence," and read through the papers in it (120-121). The note bearing Roy's address and other words was discovered and subsequently became evidence in the case against Marchand.

The seizure of that note can be justified, if at all, only as a search incident to Marchand's lawful arrest. Since the arrest occurred as a direct result of discovering Marchand's identity, the critical question is whether that discovery was lawful and this in turn depends upon whether the seizure of the driver's license was lawful.

In resolving these questions against the defendant and denying his motion to suppress, the trial court relied essentially on two legal

theories. First, the judge concluded that the removal of Marchand's license "from his wallet in order to identify him" was a proper "limited intrusion" sanctioned by Adams v. Williams, 407 U.S. 143, 145-146 (1972) and not dependent upon the officers' first having probable cause (163). In reaching this conclusion, the court accepted the defendant's claim that the license was removed from the wallet without Marchand's cooperation and that the officers "took possession of the wallet on the table" in the dining room (id.). Second, the judge concluded that the removal of the license from the wallet was in any event seizable as incident to Higgins' arrest, which, of course, had already occurred by the time Marchand's license was taken from the wallet (164).

The defendant submits that neither conclusion by the judge is correct and that, indeed, under the facts of this case, on no theory of Fourth Amendment law can the seizure of Marchand's driver's license from his wallet lying in another room be justified.

The seizure of Marchand's driver's license
cannot be justified on any theory of Fourth
Amendment law.

The timing of the events here is critical. When Marchand entered the dining room, the officers -- who had come to the apartment solely to arrest Higgins and had not even known that anyone else would be present -- were unaware of Marchand's identity. They knew only that he was in an apartment with an individual whom they were seeking. At that point in time, the officers had no probable cause to arrest Marchand. It was only after Marchand had been detained and identified through the examination of his driver's license that probable cause arose and his formal arrest followed.^{59/} Since, as will be demonstrated below, the seizure of the

^{59/} See United States v. Barragan-Martinez, 504 F.2d 1155 (9th Cir. 1974), United States v. Edmonds, 432 F.2d 577 (2nd Cir. 1970), Davis v. Mississippi, 394 U.S. 721 (1968), United States v. Lyles, 471 F.2d 1167 (5th Cir. 1972), cert. den. 419 U.S. 851 (1974), United States v. Jennings, 468 F.2d 111 (9th Cir. 1972), for proposition that where identification of a defendant has been made possible only by exploitation of initial police illegality, all the fruits of the identification are tainted.

license was invalid, all that flowed from it, culminating in Marchand's arrest and subsequent search, was tainted and the fruits of the search must be suppressed under Wong Son v. United States, 371 U.S. 471 (1963).

First, even assuming that Marchand's mere presence in the apartment provided "reasonable grounds" to justify a brief detention,^{60/} the subsequent search of his wallet and seizure of his license from his wallet fell well outside the scope of a properly limited stop and frisk.^{61/} Any police action taken pursuant to a proper stop must be "reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 20 (1968). As the Supreme Court stated in Terry:

"The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." 392 U.S. at 29 (emphasis added).

See also Sibron v. New York, 392 U.S. 40 (1968).

While under this principle a police officer may, under certain circumstances, conduct "a brief stop of a suspicious individual in order to determine his identity. . ." (Adams v. Williams, 407 U.S. 143, 146(1972)), the conducting of a physical search for, and seizure of, documentary evidence of identification -- particularly when not preceded by a request

^{60/} The court below found that under the circumstances, the officers "were entitled to question [Marchand] and to determine his identity" (156).

^{61/} The trial court's findings, as well as the evidence adduced at the pre-trial hearing, preclude any finding that the license was seized during the course of a permissible frisk. Marchand's testimony about the location of the wallet when the license was removed is uncontradicted and there is, indeed, absolutely no evidence that Marchand was frisked prior to his formal arrest.

for identification^{62/} -- cannot be deemed to fall within the scope of a valid stop. Thus, in discussing the scope of a reasonable roving border-patrol stop, the Court has stated:

"The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause."
United States v. Brignoni-Ponce, 422 U.S. 873, 881-882 (1975) (emphasis added).

Other cases discussing investigatory stops also speak in terms of inquiry (see e.g., United States v. Coates, 495 F.2d 160 (D.C.Cir. 1974)), with the right to search limited to a self-protective frisk (see e.g., Terry v. Ohio, *supra*). Under this key principle, the officers here had a right to inquire of Marchand -- and had they had reasonable grounds they would have had a right to frisk him for weapons -- but they choose not to take those actions. Their failure to act within permissible bounds and to do what they had a right to do -- inquire of Marchand about his identity -- gave them no right to act outside of permissible bounds and conduct a warrantless search of Marchand's unguarded belongings, without probable cause and without exigent circumstances. Government officers are simply not free to "rummage" through a person's belongings merely because the person happens to be on the premises of a place

^{62/} Although the trial court found that "the defendant apparently refused to cooperate by giving [the officers] his name" (163), there is no evidence that Marchand was ever asked. The judge presumably inferred "non-cooperation" from the fact that Marchand never offered his name. He was not, however, obligated to do so absent a request -- and indeed the law is not clear that he would have been obligated to give his name had he been asked.

where the officers are lawfully present. As stated by the Court in Terry v. Ohio, 392 U.S., supra at 15, it remains the

"traditional responsibility [of the courts] to guard against police conduct which is so overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials."

The seizure of the license here, without a prior request, is just that type of overbearing conduct and, contrary to the trial court's conclusion, cannot be justified as within the permissible scope of a valid investigatory stop.

Second, the seizure of the license cannot be justified as a valid search incident to Marchand's arrest. It is axiomatic that

"[a] search incident to a lawful arrest may not precede the arrest and serve as part of its justification."
Sibron v. New York, 392 U.S., supra at 67.

If, despite the officer's initial disclaimers, Marchand was in actuality under arrest from the moment he was told not to leave (see United States v. See, 505 F.2d 845, 855 (9th Cir. 1974), cert. den., 420 U.S. 992 (1975) sub nom. Gordon v. United States), then under the undisputed facts of the case, Marchand's arrest would have occurred before the officers had ascertained his identity -- and, therefore, before any probable cause had arisen. The subsequent seizure of the license and resultant discovery of Marchand's identity could not then serve to validate the precedent arrest, and without a valid prior arrest the search could not be justified as "incident" to an arrest.

Third, the seizure of the license also cannot be justified, as the trial court erroneously thought it could, as a valid search incident to Higgins' arrest. The justification for and constitutionally permissible scope of a warrantless search incident to a lawful arrest was set forth

by the Supreme Court in Chimel v. California, 395 U.S. 752, 762-763 (1969). The Court held that "when an arrest is made. . . [t]here is ample justification. . . for a search of the arrestee's person and the area 'within his immediate control' - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence" (emphasis added). However, there is absolutely no justification for a "rummaging" through a person's entire living quarters.

Following Higgins' arrest in the doorway of the apartment Higgins was immediately taken by Agent Harris into Higgins' bedroom. According to both Harris and Marchand the wallet was clearly located elsewhere -- indeed, in an entirely different room. Since it was neither on Higgins' person nor "within his immediate control" its search fell far outside the scope of Chimel and can in no way be validated as incident to Higgins' arrest.

Finally, under the circumstances of this case the "plain view" exception to the warrant requirement is likewise of no avail to the government. This doctrine cannot be used to justify general exploratory searches. Indeed, "plain view alone is never enough to justify the warrantless seizure of evidence." Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971)(emphasis in original). Its limits have been clearly delineated. Before it can be relied upon to support the seizure of evidence:

"the police officer. . . [must have] a prior justification for an intrusion in the course of which he [comes] inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification. . . and permits the warrantless seizure. Of course the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." Id., at 466 (emphasis added).

The requirement that the incriminating nature of the evidence be immediately apparent has been strictly construed. In both United States v. Clark, 531 F.2d 928 (8th Cir. 1976) and United States v. Gray, 484 F.2d 353 (6th Cir. 1973), cert. den. 414 U.S. 1158 (1974), the recordation of serial numbers of firearms inadvertently discovered during the course of a valid search for other objects has been held to be a seizure violative of the Fourth Amendment, and not within the scope of the plain view exception because the incriminating nature of the evidence was not immediately apparent. "To allow the police to seize objects, unincriminating at the time of seizure, would not in our view comport with the plain view doctrine." United States v. Gray, supra at 355.

Here there is even less justification for considering the wallet to be the type of object that is immediately identifiable as evidence of a crime. It is not contraband (as an illegal firearm might well be), and it is not an instrumentality or fruit of crime. Rather, it is a container for what are often among the most personal of possessions. Indeed, in that sense, its contents are no more in "plain view" than the contents of a closed desk drawer, and the opening of it to seize the license, in and of itself, renders the exception inapplicable.

In sum, the seizure of the license cannot be justified as within the bounds of a constitutionally permissible investigatory stop; nor does it come within the scope of any other exceptions to the Fourth Amendment. Accordingly, defendant submits that his arrest was illegal and that the denial of his motion to suppress was reversible error. ^{63/}

^{63/} The illegality of the arrest is so clear that it is unnecessary to reach the further issue of whether the reading of the papers in the wallet constituted an unreasonable search and seizure prohibited by the Fourth Amendment. However, addressing it briefly, defendant submits that the search constituted the general rummaging through a man's papers condemned by the Supreme Court in Chimel v. California, supra, and did not conform to the mandate that "the scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Chimel, supra, at 672.

III. SINCE THE GRAND JURY HEARD ONLY UNNECESSARY AND MISLEADING HEARSAY AND IDENTIFICATION TESTIMONY "INFECTED WITH SUGGESTION" THE INDICTMENT IS NOT WELL-FOUNDED AND MUST BE DISMISSED.

The grand jury heard testimony from two witnesses: Victor Roy and Special Agent Handoga. Roy testified on July 1, 1976 (170-176), and although Roy acknowledged "pick[ing] out" Marchand's photograph from an array shown to him by Handoga (175), Marchand's name was not mentioned. Three weeks later, on July 22, 1976, the grand jurors heard the testimony of Handoga which consisted largely of three categories of hearsay: (1) Handoga's and the prosecutor's "performance" of a script consisting of prior testimony of Richard Perkins (179-191); (2) the reporting of certain remarks made by Perkins (193-195, 196); and (3) the reporting of certain remarks made by Roy (195, 196). It was, as part of this hearsay, that the name Robert Marchand was presented to the grand jury for the first time. The grand jury indicted immediately after hearing Handoga and plainly, it was his testimony on which the grand jurors relied.

Under the law of this Circuit and the circumstances of this case -- particularly the government's patten of proceeding at every stage upon uncertain and unreliable identifications of the defendant -- this use of hearsay to supply the grand jury with an identification of Marchand requires reversal and dismissal of the indictment. This result is especially required since the aspect of Roy's non-hearsay testimony which linked Marchand to the crime was based squarely on Roy's photographic selection, which the trial court found not positive and "infected with suggestion" (see 148, 159).

A) The Unnecessary and Misleading Presentation of Hearsay to the Grand Jury Violates the Estepa Rule.

The government offers no excuse or explanation for its use of hearsay evidence before the grand jury. Indeed, it concedes that Perkins was available to testify but was not called (212). Roy did in fact appear and testify with regard to some of the matters covered by Handoga. Yet, three weeks later Handoga presented the grand jury with information which he attributed to Roy which went significantly beyond the testimony which Roy had presented. (Cf. 195 to 175.) Nor is there any indication that Roy was not available to be recalled before the grand jury to amplify his testimony first-hand. Thus, the government has flatly violated this Court's long standing admonition that

"[h]earsay evidence should only be used [before a grand jury] when direct testimony is unavailable or it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge." United States v. Umans, 368 F.2d 725, 730 (2nd Cir. 1966), cert. granted, 386 U.S. 940 (1966), cert. dismissed as improvidently granted, 389 U.S. 80 (1967).

This Court's insistence on the avoidance of unnecessary hearsay in grand jury proceedings, expressed in a long line of decisions,^{64/} see United States v. Ramirez, 482 F.2d 807, 811 (2nd Cir. 1973), cert. den., 414 U.S. 1070 (1973) sub nom Gomez v. United States, has been crystallized in United States v. Estepa, 471 F.2d 1132, 1337 (2nd Cir. 1972) into a rule requiring dismissal in two circumstances: first, where the case involves a high probability that the grand jury would not have indicted if presented with first-hand testimony rather than hearsay; and second, where the prosecution misleads the grand jurors as to "the shoddy merchandise

^{64/}

The ground for this Court's admonition against needless hearsay was stated in Umans, 368 F.2d, *supra*, at 730:

[the] excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent."

they are getting. . .'", quoting United States v. Payton, 363 F.2d 996, 1000 (2nd Cir. 1966), cert. denied, 385 U.S. 993 (1966) (Friendly, J., dissenting).

This rule has evolved from the recognition that the risk of improper prosecutions is lessened by requiring the use of direct first-hand evidence where possible. In United States v. Payton, 363 F.2d, supra, at 1000 (dissenting opinion) -- the opinion originally articulating this concern with needless use of hearsay before grand juries -- Judge Friendly pointed out that the need for direct evidence is "particularly important in these narcotics prosecutions" because in such cases there are frequent problems with the reliability of identifications. Judge Friendly's insight pinpoints the very problem which lies at the heart of this indictment -- the total absence of direct and reliable identification evidence. As will be demonstrated below, the second-hand and unreliable identification of Marchand which was presented to the grand jury -- and the resultant mistaken indictment -- requires dismissal under both branches of the Estepa rule.

An examination of Handoga's testimony ostensibly reporting certain remarks made by Perkins, and his "performance" of Perkins' prior testimony, indeed dramatizes the dangers of unreliability noted by Judge Friendly in Payton. When Handoga was asked before the grand jury if he had ever shown Perkins a photograph array containing Marchand's picture, he answered:

"A. Yes, I showed Mr. Perkins a spread of approximately twelve to thirteen photographs. He looked at the photographs and he identified Robert Marchand."
(194-195, emphasis added.)

As a matter of fact, however, when Perkins was asked about his photographic selection at both the evidentiary hearing (85) and at trial (339) he testified that he did not make a positive identification of Big Foot, but rather selected the photographs that "were the closest" (338, see 343).

Indeed, the trial court specifically found that Perkins selected "the photographs of two people he felt most closely resembled" the suppliers, only one of which was a picture of Marchand, and that his identification of Marchand was "not certain." (149)

Nor is Handoga's testimony regarding Perkins' having used the name Robert Marchand in the agent's office (194) consistent with Perkins' later testimony at the evidentiary hearing. While Handoga testified that "Perkins said...he had dealings...with Robert Marchand who he knew as Big Foot" (194, emphasis added), Perkins testified at the evidentiary hearing that he "never knew [the supplier's] . . . name as Bob Marchand" (87), that it was Handoga who first used the name "Marchand" before showing Perkins the pictures (86), and that his selection of Marchand's photograph was not a positive identification (85,90, see also Perkins' trial testimony at 339).

Furthermore, the only reference to "Marchand" which appears in the Perkins grand jury "script" is the statement "I found out his [Roy's friend's] name was Bob Marchand." He said he got the information from a person called "Big Foot" (181).^{64a/} On its face, this testimony is ambiguous: the "He" may refer to "Bob Marchand" which would indicate that Perkins had two persons in mind -- Bob Marchand and Big Foot. Even if read as an "identification" of the name "Marchand," this testimony does not reveal what Perkins' later cross-examined testimony reveals -- namely, that the "name" of "Bob Marchand" originated with Handoga, not Perkins.

Handoga's testimony regarding Roy's identification of Marchand also contains precisely the kind of hearsay which can lead to mistaken identification -- and hence mistaken indictment. Indeed, Handoga presented the

^{64a/} The Perkins "script" contains no testimony about Perkins' selection of Marchand's photograph.

grand jury with hearsay testimony in which he characterized Roy's identification of Marchand in a far more positive way that Roy himself had. Roy's own testimony before the grand jury contains only one bit of evidence which could even be considered part of a link between Marchand and the crime for which he was indicted: Roy testified that he "pick[ed] out" first one, and then another, photograph from a series of photographs presented by Handoga (175). Roy did not state that he identified the picture as "Marchand" or even as "the supplier"; indeed, Roy merely testified that the photograph he selected was of an individual he "recognized." Id. It is only from Handoga that the grand jury heard any claim that the person identified was Marchand, or that Roy identified Marchand's photograph as the supplier (195). Roy's testimony was given on July 1, 1976 and Handoga's on July 22, 1976. At the time Handoga first suggested to the jurors that Roy had made a positive identification of his supplier, and that the person so identified was Marchand, the government did not inform the jurors that they had a right to recall Roy and question him, or that Roy could be available at some time when the grand jury might hear him. Cf. United States v. Estepa, 471 F.2d, supra at 1134.

Thus, under Estepa and Payton, Handoga's testimony with respect to both Perkins' and Roy's supposed identification of Marchand is needless hearsay and requires dismissal under either branch of the Estepa rule. First, when stripped of all hearsay, the record of the grand jury proceedings reveals no evidence upon which the grand jurors could have based an indictment against Marchand. The sum total of the non-hearsay evidence provided by Handoga (exclusive of his reports of the events surrounding the arrest

of Roy and Perkins) alleges only that, within two and a half months of their arrests, one or more calls were made from Roy's and Perkins' phone to a phone in Vermont; that this phone was listed in the name of one Robert Marchand; that there was another phone in the same house listed to an Ann Curtis; and that Ann Curtis resided in the house. The only evidence added by Roy's live testimony was his own part in the crime and his selection of a photograph which he "recognized" -- testimony which in fact did not name Marchand, and which, as will be discussed below, was "infected with suggestion."

Had Perkins' own testimony regarding the matters touched on in hearsay by Handoga been presented to the grand jury in lieu of the misleading hearsay version presented by Handoga, the uncertainty of Perkins' "most resembles" photographic identification might well have been exposed, and the highly significant fact that the "name" of Bob Marchand originated with Perkins, not Handoga, revealed. Further, if the jurors had in fact had an opportunity to question Roy regarding his photographic selection they may have realized the suggestiveness of the procedures used or at least learned that it was Handoga, and not Roy, who raised the name "Marchand" during those procedures (56, 101-102). As it was, the grand jury had before it literally not one word of non-hearsay testimony linking Marchand to the crime.

But, more clearly, the second branch of the Estepa rule renders this indictment deficient. In Estepa itself the grand jury was misled as to the simple fact that what it had heard was hearsay. Here, the grand jury was misled in a more insidious way. The prosecutor failed to inform the jurors that Perkins was available to testify, that they had the right to call him to appear before them in person,

and that they had the right to recall Roy. Without such information, the mere fact that the grand jurors may be aware that the testimony presented to them is second-hand does not put them in a position to "seek something better if they wish." Payton, 363 F.2d, supra at 1000. As laymen the grand jurors cannot be expected to know the law regarding their own powers. Thus in United States v. Gallo, 394 F.Supp. 310 (D.Conn. 1975), the court applied the Estepa rule to dismiss an indictment which had been obtained solely by the submission of transcripts of testimony which previously given before another grand jury. The indicting grand jury was informed that its predecessor body had returned a true bill which the government thought defective on technical grounds. Among several grounds cited for the dismissal, was the failure to inform the jurors that the witness "was available for live testimony in the event they wished to evaluate his credibility for themselves and not rely on the judgment of the preceding grand jury." Id., at 315. The instant case is indeed a far stronger one for dismissal: here no prior grand jury heard Perkins' crucial testimony revealing the uncertainty of his photographic identification of Marchand.

Similarly, in United States v. Pastor, 419 F.Supp. 1318, 1324 (S.D.N.Y. 1976), the court held that where a witness was supplementing his own testimony to a prior grand jury, submission of the prior testimony in written form without informing the jurors that they could question the witness regarding his former testimony or have him testify anew amounted to a violation of the second branch of the Estepa rule, and required dismissal of the indictment. The court held, in effect, that knowledge that the grand jury is getting "shoddy merchandise" does no good unless it also knows that it can in fact "seek something better."

This Court, in Ramirez, supra, 482 F.2d at 811, n. 3., has suggested that the Estepa rule may well be expanded far beyond its present perimeters and that "unnecessary use of hearsay," regardless of whether the grand jury has been misled as to the hearsay character of the evidence before it may, in the future, be treated as a separate and independent ground for invoking the Estepa remedy. While this case falls squarely within the present borders of the Estepa rule, Ramirez is an important indication of the continued vitality of the court's concern with the presentation of hearsay to grand juries.^{65/}

B) Identification Testimony "Infected With Suggestion,"
Presented To The Grand Jury As The Only Non-Hearsay
Evidence, Cannot Support An Indictment.

The very reason for the historically broad investigatory powers of the grand jury, as the Supreme Court said in Branzburg v. Hayes, 408 U.S. 665, 688 (1972), is that its task is "to return only well-founded indictments." (Emphasis added.) Among its basic responsibilities is "the protection of citizens against unfounded criminal prosecutions." United States v. Calandra, 414 U.S. 338, 343 (1974).

As discussed above, the only testimony presented to the grand jury specifically indicating that Roy had identified "Robert Marchand"

^{65/} This Court has noted that the Estepa rule survives United States v. Calandra, 414 U.S. 338 (1974) because it is an exercise of supervisory powers. United States v. Bertolotti, 529 F.2d 149, 159 (2nd Cir. 1975). An additional distinction from Calandra is that the Fourth Amendment exclusionary rule is designed to deter certain police activities, while the Estepa rule is designed to deter prosecutorial conduct which is objectionable because it will introduce less reliable evidence into grand jury proceedings. Cf., Note: Quashing Federal Indictments Returned Upon Incompetent Evidence, 62 Harv.L.Rev. 111, 116, 117 (1948). Thus, the calculus of Calandra is inapplicable to Estepa problems. See, discussion infra, at n.66.

as the supplier was hearsay and violative of Estepa. But apart from that, the evidence about Roy's supposed "identification" of Marchand could not contribute to a well-founded indictment for that evidence was based squarely on the photograph "identification" which was later found by the trial court to be so "infected by suggestion" as to require its suppression (159).

The rationale underlying the rule that suggestive identifications be suppressed is that:

"they increase the likelihood of misidentification, and unnecessary ones [as this one clearly was, see discussion, supra, at pp. 3-4] are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188, 198 (1972).

The vice which condemns suggestive identifications is thus their unreliability. See id., at 199. See also Simmons v. United States, 390 U.S. 377 (1968); Brathwaite v. Manson, 527 F.2d 363, 366-371 (2nd Cir. 1975), cert. granted, 425 U.S. 957 (1976). It is precisely this vice which infects Roy's identification of Marchand as Big Foot, which in turn infects the entire indictment against the defendant.

When an indictment issues, as here, essentially on unreliable identification evidence, the jurors simply cannot be deemed to have performed their function, as stated in Calandra, to "return only well-

founded indictments."^{66/} Indeed, allowing an indictment to stand on evidence which is later ruled as a matter of law to be too unreliable to be admitted at trial -- that is , of too little probative value to be put

^{66/} Calandra is often cited for the proposition, at 414 U.S. 344-345, that "the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ."

Calandra cites only two cases for this proposition. The first is Costello v. United States, 350 U.S. 359 (1956). In that case, exigent circumstances (the vast amount of material and number of witnesses which the case involved) justified the use of hearsay before the grand jury, and the same "hearsay" was recognized to be "an important part of the competent evidence" at trial, *id.*, at 365 (Burton, J., concurring). The second case cited in Calandra, Holt v. United States, 318 U.S. 245 (1910) decided only that where some incompetent evidence is "considered along with the rest," *id.*, at 248, the indictment will not necessarily be quashed. Justice Holmes, at 247, expressly reserved the question "how far, if at all, the court is warranted in inquiring into the nature of the evidence on which a grand jury has acted."

Plainly then, the passage quoted from Calandra is not a report of prior law, but rather the view enunciated by the Calandra court itself. Yet, Calandra, at 347, rested expressly on the rationale that the exclusionary rule's "prime purpose" is the deterrence of police misconduct and not the "redress [of] the injury to the privacy of the search victim." Thus the appropriate judicial strategy was a weighing of incremental deterrence against the costs of the exclusion of evidence. See *id.*, at 349-352. The principle at issue in the present case is quite different: defendant's challenge to the testimony regarding Roy's identification is not based on a deterrence theory, but on the trial court's conclusion that that testimony was "infected by suggestion" (159) -- hence unreliable. The Calandra reasoning does not reach this question at all; it has nothing to do with excluding from the grand jury testimony which has in fact little, if any, probative value, and with respect to which the grand jury, a body of laymen untrained in the analysis of evidence, acting without the guidance provided at trial by the court, may be misled.

before the trier of fact in any form -- especially when that unreliable evidence is the sole evidence not violative of the Estepa rule that links the defendant to the crime, invites an enormous risk of unfounded prosecutions. As Justice Burton said, concurring, in Costello v. United States, 350 U.S. 359, 364 (1956)

"if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen."

See also this Court's decisions in United States v. Tane, 329 F.2d 848 (2nd Cir. 1964) and United States v. Kahn, 366 F.2d 259 (2nd Cir. 1966), cert. den. 385 U.S. 948 (1966). Justice Burton's reasoning carries special force in the Second Circuit because of

"this circuit's view that an indictment constitutes a finding of probable cause and avoids the need for a preliminary hearing under F.R.Cr.P. 5(c)." Estepa, 471 F.2d, supra, at 1136.

Thus, the Roy evidence -- the only identification evidence presented to the grand jury which was not hearsay related by Handoga -- is not of a character to save the indictment from dismissal. ^{67/}

^{67/}

Moreover, dismissal of the indictment is required because the government abused the grand jury process by using it to obtain an ex parte interview with Roy, where, under the cloak of the lawfulness and respectability of a grand jury subpoena, Roy was subjected to a photograph identification procedure which was, in the words of the trial court, "infected with suggestion" (159). Durbin v. United States, 221 F.2d 520 (D.C.Cir. 1954); United States v. Gurney, 393 F.Supp. 683 685 (M.D.Fla. 1973); United States v. Thomas, 320 F.Supp. 527 (D.D.C. 1970). See also In Re Grand Jury Proceedings (Schofield), 486 F.2d 85 (3rd Cir. 1973).

C O N C L U S I O N

The defendant, Robert P. Marchand, was indicted and then convicted upon a record totally barren of competent evidence sufficient to identify him as the criminal actor. For the foregoing reasons the defendant respectfully requests that his conviction be reversed and a judgment of acquittal entered, or alternatively that his case be remanded for a new trial, or that the indictment be dismissed.

Respectfully submitted,

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April 27, 1977

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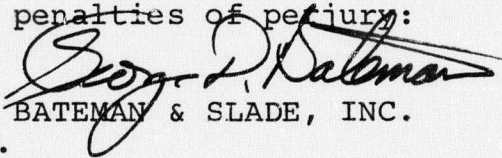
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